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No. 03-1574

In The Supreme Court of the United States

BOBBY JOE WINCE, in his individual capacity; JOHN DOLAN, in his individual capacity; and THOMAS DUSING, in his individual capacity,

Petitioners,

v.

SUSAN STEMLER, WILLIAM CHIPMAN, Administrator of the Estate of CONNI BLACK, and RANDY BLACK, Legal Guardian of Shianne Black,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The *Rooker-Feldman* doctrine provides that lower federal courts must refrain from adjudicating federal claims that are inextricably intertwined with issues decided in state court proceedings. In this case, the Kentucky Supreme Court ruled that the defendant police officers did not owe a duty to Conni Black, and consequently, could not be found negligent under Kentucky law for failing to protect Black from injuries she sustained as a passenger in a drunken driving accident that occurred after Black left the scene of a traffic stop with an intoxicated driver. The basis for the Kentucky Supreme Court's ruling was the Court's determination that Black was never in the custody of police officers during the traffic stop, and Kentucky law does not impose a duty on police officers to protect citizens in the absence of a custodial relationship. In deciding that Black's estate could pursue a federal substantive due process claim against the police officers for failing to protect Black, a claim which also hinges on the issue whether Black was in police custody during the traffic stop, did the Sixth Circuit adjudicate a federal claim that is inextricably intertwined with an issue previously decided in state court proceedings, in contravention of the *Rooker-Feldman* doctrine?

2. Black's estate and Stemler filed lawsuits in Kentucky state court alleging claims under state law based on the traffic stop, and subsequently filed actions in federal court asserting federal claims arising from the very same traffic stop. In the face of clear Kentucky precedent holding that two causes of action arising from the same nucleus of facts are "the same" for purposes of claim preclusion and must

QUESTIONS PRESENTED FOR REVIEW – Continued

be asserted in the same proceeding, the Sixth Circuit ruled that Black's estate and Stemler were not precluded from splitting their causes of action between federal and state court. Was the Sixth Circuit's ruling erroneous, and, further, did the Sixth Circuit err in failing to certify the question to the Kentucky Supreme Court?

PARTIES

The caption of the case contains the names of all parties to the proceeding: Bobby Joe Wince; Thomas Dusing; John Dolan; William Chipman, Administrator of the Estate of Conni Black; and Susan Stemler; and Randy Black, Legal Guardian of Shianne Black.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. STATEMENT OF MATERIAL FACTS	2
B. PROCEEDINGS BELOW	3
1. The State Court Proceedings	3
2. Simultaneous Federal Court Proceedings	5
REASONS FOR GRANTING THE WRIT	7
I. CERTIORARI IS WARRANTED TO PROVIDE CRITICAL GUIDANCE TO LOWER FEDERAL COURTS CONCERNING THE PROPER SCOPE AND APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE	7
II. THE SIXTH CIRCUIT'S REFUSAL TO APPLY THE *ROOKER-FELDMAN* DOCTRINE IS AN OPEN INVITATION FOR PARTIES TO SPLIT THEIR CAUSES OF ACTION BETWEEN STATE AND FEDERAL COURTS, IN DEROGATION OF WELL-ESTABLISHED PUBLIC POLICIES AND IN A MANNER LIKELY TO UNDERMINE COMITY BETWEEN THE STATE AND FEDERAL COURTS	13

TABLE OF CONTENTS – Continued

Page

A. Because Chipman's substantive due process claim only succeeds to the extent that the Kentucky Supreme Court was wrong in deciding Black was not in custody, the Sixth Circuit should have abstained under the *Rooker-Feldman* doctrine 13

B. The Sixth Circuit's decision is an open invitation for parties to split their claims between federal and state courts, in derogation of the principals underlying the *Rooker-Feldman* doctrine 17

III. THE SIXTH CIRCUIT'S GROSS MISAPPLICATION OF KENTUCKY LAW DEFINING WHAT CONSTITUTES "THE SAME CAUSE OF ACTION" FOR PURPOSES OF CLAIM PRECLUSION ANALYSIS FLIES IN THE FACE OF KENTUCKY'S LONG-ESTABLISHED PUBLIC POLICY 19

CONCLUSION 29

APPENDIX

Sixth Circuit Decision ..... App. 1

Sixth Circuit Judgment ..... App. 24

Eastern District of Kentucky Order granting, in part, and denying, in part, Defendants' Motion for Summary Judgment ..... App. 26

Eastern District of Kentucky Order denying Defendant Wince's Motion for Summary Judgment on Stemler's fabrication of evidence and excessive force claims ..... App. 32

TABLE OF CONTENTS – Continued

Page

Sixth Circuit Order Denying Rehearing.....App. 37

Kentucky Supreme Court decision .....App. 39

TABLE OF AUTHORITIES

Page

CASES:

Allen v. McCurry, 449 U.S. 90 (1980) 19

Amer. Reliable Ins. Co. v. Stillwell, 336 F.3d 311 (CA4 2003) 18

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 7

Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. App. 1992) 4, 15

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) 28

Barnes v. McDowell, 848 F.2d 725 (CA6 1998) 20

Bass v. Butler, 224 F.Supp.2d 950 (E.D. Pa. 2002) 12

Bates v. Jones, 131 F.3d 843 (CA9 1997) 8

Bechtold v. City of Rosemount, 104 F.3d 1062 (CA8 1997) 13

Blue Cross & Blue Shield of Md., Inc. v. Weiner, 868 F.2d 1550 (CA11 1989) 13

Brokaw v. Weaver, 305 F.3d 660 (CA7 2002) 8

Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994) 21

Catz v. Chalker, 142 F.3d 279 (CA6 1998) 14

Centifanti v. Nix, 865 F.2d 1422 (CA3 1989) 10

Centres v. Town of Brookfield, 148 F.3d 699 (CA7 1998) 10

TABLE OF AUTHORITIES – Continued

Page

Charchenko v. City of Stillwater, 47 F.3d 981 (CA8 1995) 8

Cherrington v. Skeeter, 344 F.3d 631 (CA6 2003) 15

City of Florence v. Chipman, 38 S.W.3d 387 (Ky. 2001) 16

Creamtop Creamery v. Dean Milk Co., 383 F.2d 358 (CA6 1967) 29

Dennis v. Bullitt Fiscal Ct., 784 S.W.2d 608 (Ky. App. 1990) 21, 24, 25, 28

DeShaney v. Winnebago Co. Dept. of Social Services, 489 U.S. 189 (1989) 15

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 9

Egbert v. Curtis, 695 S.W.2d 123 (Ky. App. 1985) 21

Fryman v. Harrison, 896 S.W.2d 9080 (Ky. 1995) 4, 15

Garry v. Geils, 82 F.3d 1362 (CA7 1996) 8

Gottfried v. Med. Planning Servs. Inc., 142 F.3d 326 (CA6 1998) 8

Guarino v. Larsen, 11 F.3d 1151 (CA3 1993) 18

Haring v. Prosise, 462 U.S. 306 (1983) 20

Harris v. Ashley, 165 F.3d 27 (CA6 1998) 21

Harris v. N.Y. State Dept. of Health, 202 F.Supp.2d 143 (S.D.N.Y. 2002) 8, 22, 23

Heylinger v. State Univ. and Community College Sys. Of Tenn., 126 F.3d 849 (CA6 1997) 28

TABLE OF AUTHORITIES – Continued

Page

Johnson v. DeGrandy, 512 U.S. 997 (1994) 7

Johnson v. Supreme Ct. of Ill., 165 F.3d 1140 (CA7 1999) 13

Keene Corp. v. Cass, 908 F.2d 293 (CA8 1990) 14

Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163 (CA10 1998) 12

Kirchner v. Riherd, 702 S.W.2d 33 (Ky. 1985) 24

Kougasian v. TMSL, Inc., 359 F.3d 1136 (CA9 2004) 12

Kremer v. Chemical Construction Co., 456 U.S. 461 (1982) 19

Lockhart v. Fretwell, 506 U.S. 364 (1993) 18

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 370 (1985) 19

McAdoo v. Dallas Corp., 932 F.2d 522 (CA6 1991) 20

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) 19

Moccio v. N.Y. State Office of Court Adm., 95 F.3d 195 (CA2 1996) 13

Network Towers, LLC v. Town of Hagerstown, 2002 WL 1364156 (S.D.Ind.) 8

Parkview Assoc. Partnership v. City of Lebanon, 225 F.3d 321 (CA3 2000) 12

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 7, 9, 14

Peterson Novelties, Inc. v. City of Berkley, 305 F.3d 386 (CA6 2002) 14

TABLE OF AUTHORITIES – Continued

Page

Powell v. Powell, 80 F.3d 464 (CA11 1996) 17, 18

Razatos v. Colorado Supreme Court, 746 F.2d 1429 (CA10 1984) 10

Robinson v. Ariyoshi, 753 F.2d 1468 (CA9 1986) 8

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 14

Stemler v. City of Florence, 350 F.3d 578 (CA6 2003) 1

Stern v. Nix, 840 F.2d 208 (CA3 1988) 9

Valenti v. Mitchell, 962 F.3d 288 (CA3 1992) 8

Verizon Maryland, Inc. v. Public Service Comm'n of Md., 535 U.S. 635 (2002) 7

Wang v. N.H. Bd. of Registration in Med., 55 F.3d 698 (CA1 1995) 13

Watts v. K, S & H, 957 S.W.2d 233 (Ky. 1997) 21, 23

Weis Builders, Inc. v. Kay S. Brown Living Trust, 236 F.Supp.2d 1197 (D. Colo. 2002) 12

Whittaker v. Cecil, 69 S.W.3d 69 (Ky. 2002) 25

Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459 (Ky. 1998) 21, 28

Zealy v. City of Waukesha, 153 F.Supp.2d 143 (S.D.N.Y. 2001) 8

STATUTES AND RULES:

28 U.S.C. §1254(1) 1

28 U.S.C. §1257 17

28 U.S.C. §1331 17

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §1983 ..... 2, 14, 22, 24

U.S. Constitution, Fourteenth Amendment, Section 1 1

MISCELLANEOUS:

Adam McLain, *The Rooker-Feldman Doctrine: Toward a Workable Role*, 149 U. Pa. L. Rev. 1555 (2001) 9

Rachel Thomas Rowley, *The Rooker-Feldman Doctrine: A Mere Superfluous Nuance or a Vital Civil Procedure Doctrine?*, 78 Denv. U. L. Rev. 321 (2000) 9

Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085, 1088 (1999) 7

PETITION FOR WRIT OF CERTIORARI

Bobby Joe Wince, Thomas Dusing, and John Dolan respectfully petition the United States Supreme Court for a Writ of Certiorari to review the Opinion of the U.S. Court of Appeals for the Sixth Circuit entered on December 2, 2003.

OPINIONS BELOW

The decision advanced for review is reported as *Stemler v. City of Florence*, 350 F.3d 578 (CA6 2003), and is attached in the Appendix, *infra*, pp. 1a-23a. A Petition for Rehearing was denied on February 20, 2004, in an unreported decision which is attached in the Appendix, *infra*, pp. 37a-38a. The decisions of the U.S. District Court for the Eastern District of Kentucky are not reported and are attached in the Appendix, *infra*, pp. 26a-31a and 32a-36a.

JURISDICTION

The Opinion of the U.S. Court of Appeals for the Sixth Circuit was entered on December 2, 2003. (App. 1a-23a) On February 20, 2004, the Court of Appeals denied a timely Petition for Rehearing. (App. 37a-38a) Pursuant to Supreme Court Rules 13.1 and 13.3, this Petition has been filed within ninety (90) days of the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

On February 19, 1994, Conni Black had an argument with her boyfriend, Steve Kritis, at a bar and left in a car driven by Susan Stemler. Kritis began chasing the pair in his own vehicle until City of Florence police officers and Boone County Sheriff's Deputies, having been alerted to the chase by a concerned citizen, stopped both vehicles. At

the conclusion of the traffic stop, Black voluntarily left with Kritis in his vehicle, while Stemler was arrested for driving under the influence of alcohol.

A few minutes after leaving the scene of the traffic stop, Black and Kritis began to argue. Black struck Kritis with a drywall tool she found in the front seat of Kritis' vehicle, and Kritis retaliated by striking Black. While fighting with Black, Kritis lost control of his vehicle and struck a guardrail, killing Black. Officers who responded to the accident found Kritis to be intoxicated and arrested him for driving under the influence of alcohol.

Based on these facts, Black's estate and Stemler each initiated (and simultaneously prosecuted) complaints in state court and in federal district court, resulting in a total of four legal actions revolving around the same nucleus of facts.

B. PROCEEDINGS BELOW

1. The State Court Proceedings

On March 7, 1994, William Chipman, the administrator of Black's estate, filed a complaint in the Boone Circuit Court against the City of Florence, Kentucky; the three Florence police officers who were at the scene of the traffic stop, Bobby Joe Wince, Thomas Dusing, and John Dolan; Boone County, Kentucky; Boone County Sheriff Ron Kenner; and two Boone County deputies who were also at the scene of the traffic stop, Chris Alsip and Rob Reuthe. On behalf of Black's estate, Chipman asserted that the officers and their respective municipal employers were liable for negligence in connection with Black's death.

On May 20, 1994, Stemler filed a complaint in state court against the City of Florence, Wince, Dusing and

Dolan. She alleged that the officers and their respective municipal employers were liable for malicious prosecution, false arrest and imprisonment, abuse of process, assault and battery, and negligent or intentional infliction of severe emotional distress.

The Boone Circuit Court consolidated the cases.

In April 1996, after extensive discovery, the Boone Circuit Court granted summary judgment to all defendants on all the claims presented by the two complaints, except for Stemler's assault and battery claim against Wince. Stemler later dismissed that claim voluntarily.

On appeal, the Kentucky Court of Appeals reversed in part the decision of the Boone Circuit Court, ruling that summary judgment had been improperly granted on Chipman's negligence claim. However, the appellate court affirmed the circuit court's decision granting summary judgment to defendants on Stemler's claims. Stemler did not appeal further.

On February 22, 2001, the Kentucky Supreme Court reversed the decision of the Kentucky Court of Appeals and reinstated the decision of the Boone Circuit Court. The Kentucky Supreme Court determined, based on a careful analysis of the well-documented facts, that there was no evidence Black had been in police custody at any time on the night of her death.[1] Therefore, the Kentucky Supreme Court found that no "special relationship" existed and that the defendants had no common law duty to

---

[1] In Kentucky, a police officer has no common law duty to protect a citizen from injuries caused by a third person unless a "special relationship" exists between the officer and the citizen. A "special relationship" arises when an officer places the citizen in custody or otherwise restrains the citizen. *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky. App. 1992); *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995).

protect Black from the harm caused by Kritis. Moreover, the Kentucky Supreme Court ruled that, even if a "special relationship" existed, the fight between Black and Kritis was a superceding event that destroyed the causal connection between the defendant officers' conduct and the harm which befell Black. Thus, the Kentucky Supreme Court ruled that it was appropriate to grant summary judgment to defendants on Chipman's negligence claim.

2. Simultaneous Federal Court Proceedings

On March 31, 1994, Chipman filed a complaint in the U.S. District Court for the Eastern District of Kentucky against the same defendants designated in his state court action. Based on the same facts that gave rise to his state court action, Chipman asserted that the officers and their respective municipal employers violated Black's constitutional right to substantive due process in connection with her death. On August 2, 1994, the district court granted the individual officers' motion to dismiss under Civil Rule 12(b)(6) on the ground of qualified immunity. On July 3, 1996, the district court granted the City of Florence's and Boone County's motions for summary judgment.

In the interim, on January 24, 1995, Stemler filed a complaint in district court against the same defendants designated in the action she had previously filed in state court. Based on the same facts that gave rise to her state court action, Stemler alleged that the officers and their respective municipal employers deprived her of equal protection of the law and used excessive force in arresting her, in violation of the Fourth Amendment. On October 6, 1995, the district court granted the individual officers' motion to dismiss on the basis of qualified immunity. On July 3, 1996, after consolidating Stemler's case with

Chipman's, the federal district court awarded summary judgment to the City of Florence and Boone County.

Chipman and Stemler appealed the federal district court's decisions to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit upheld the district court's dismissal of Chipman's and Stemler's claims against the City of Florence and Boone County. However, the Sixth Circuit reversed the district court's dismissal of Chipman's claim against the individual officers. In addition, the Sixth Circuit ruled that the federal district court should not have dismissed Stemler's equal protection claim, and upheld its refusal to dismiss her claim for excessive force against the individual officers. As a result, the Sixth Circuit remanded the case to the district court for consideration of the remaining claims. Shortly thereafter, Stemler amended her Complaint to allege that Wince had fabricated evidence against her.

Subsequently, the district court ordered the cases held in abeyance pending a decision by the Kentucky Supreme Court regarding the propriety of the Boone Circuit Court's decision granting summary judgment in favor of defendants on Chipman's negligence claim in the state court proceeding. Ultimately, the Kentucky Supreme Court ruled that the Boone Circuit Court had been correct in granting summary judgment in the defendants' favor in the state law action. Importantly, the Kentucky Supreme Court determined that Black had not been in police "custody" on the night of her death and that, as a result, the officers had no common law duty to protect her from the injuries inflicted on her by Kritis.

Following the Kentucky Supreme Court's decision, the federal district court granted summary judgment to the officers on Chipman's substantive due process claim. In so

doing, the district court ruled that the issue whether Black was in "custody" could not be relitigated on *res judicata* grounds. Although the defendant officers argued that the *Rooker-Feldman* doctrine also barred Chipman from pursuing his federal claims, the district court did not address that argument in its Order.

On appeal, the Sixth Circuit reversed the district court's decision, finding that the Kentucky Supreme Court's determination that Black was not in custody was not essential to that Court's holding. As such, the Sixth Circuit refused to afford preclusive effect to the Kentucky Supreme Court's decision. The Sixth Circuit also rejected the defendant officers' argument that *Rooker-Feldman* barred Chipman's federal claims.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. CERTIORARI IS WARRANTED TO PROVIDE CRITICAL GUIDANCE TO LOWER FEDERAL COURTS CONCERNING THE PROPER SCOPE AND APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE

This Court has had few occasions to address the *Rooker-Feldman* doctrine. In that regard, this Court has mentioned the doctrine just four times, in *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989); and *Verizon Maryland, Inc. v. Public Service Comm'n of Md.*, 535 U.S. 635 (2002). At the same time, however, consideration of the doctrine has experienced "explosive growth" in the lower federal courts. *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085, 1088 (1999). As a result of the sparse guidance

available from this Court regarding the *Rooker-Feldman* doctrine, lower courts have struggled to define and apply the doctrine consistently, and commentators and attorneys have struggled to interpret it. As one district court said:

> . . . the court acknowledges the comments of Professor Bandes in a symposium on the doctrine: "A review of many of the lower court opinions reflects that the lower courts, in attempting to delineate the doctrine's scope, have spawned a complex, confusing, and sometimes contradictory body of precedent." Amen.

Network Towers, LLC v. Town of Hagerstown, 2002 WL 1364156 (S.D.Ind.) (citation omitted). *See also Brokaw v. Weaver*, 305 F.3d 660 (CA7 2002); *Gottfried v. Med. Planning Servs. Inc.*, 142 F.3d 326 (CA6 1998); *Bates v. Jones*, 131 F.3d 843 (CA9 1997); *Harris v. N.Y. State Dept. of Health*, 202 F.Supp.2d 143 (S.D.N.Y. 2002); *Zealy v. City of Waukesha*, 153 F.Supp.2d 143 (S.D.N.Y. 2001).

For instance, the judiciary and the legal profession have had difficulty defining the relationship of *Rooker-Feldman* to other preclusionary and abstention doctrines, such as *res judicata* and *Younger*, and have reached contradictory conclusions in that regard. *See Robinson v. Ariyoshi*, 753 F.2d 1468 (CA9 1986) (concluding *Rooker-Feldman* is co-extensive with *res judicata*); *Garry v. Geils*, 82 F.3d 1362 (CA7 1996) ("*res judicata* and the *Rooker-Feldman* doctrine are not co-extensive"); *Valenti v. Mitchell*, 962 F.3d 288 (CA3 1992); and *Charchenko v. City of Stillwater*, 47 F.3d 981 (CA8 1995) (noting *Rooker-Feldman* and preclusion principles are extremely similar).

The legal profession has also struggled to identify the purpose and role of the *Rooker-Feldman* doctrine, given its overlap with other preclusionary and abstention doctrines. *See e.g.*, Rachel Thomas Rowley, *The Rooker-Feldman*

Doctrine: A Mere Superfluous Nuance or a Vital Civil Procedure Doctrine?, 78 Denv. U. L. Rev. 321 (2000); Adam McLain, *The Rooker-Feldman Doctrine: Toward a Workable Role*, 149 U. Pa. L. Rev. 1555 (2001).

Of particular importance, however, is the difficulty lower federal courts have had in applying the *Rooker-Feldman* doctrine's "inextricably intertwined" formula in order to determine when they lack jurisdiction to hear cases. The "inextricably intertwined" formula requires federal courts to determine not only which claims were decided in state court, but also to identify claims that were not necessarily decided in state court but which are, nonetheless, "inextricably intertwined" with the decided claims. This Court's decision in *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983), provides little guidance to lower federal courts charged with that responsibility, and only one other case decided by this Court has addressed the issue. Specifically, in his concurrence in *Pennzoil*, *supra*, Justice Marshall said "a federal claim is inextricably intertwined . . . if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Id.* at 25. Justice Marshall's statement has proven difficult for lower courts to apply, resulting in inconsistent holdings, sometimes within a single federal circuit.

For example, in *Stern v. Nix*, 840 F.2d 208 (CA3 1988), the Third Circuit described an action attacking a Pennsylvania Supreme Court rule as a "skillful attempt to mask the true purpose of the action", which the court said was to void the state court's judgment. In that case, the Third Circuit applied *Rooker-Feldman* as a bar to the federal court proceeding. Yet, under nearly identical circumstances, the Third Circuit allowed a generalized constitutional

challenge to the same Pennsylvania Supreme Court rule to proceed in *Centifanti v. Nix*, 865 F.2d 1422 (CA3 1989).

In a case similar to *Centifanti*, the Tenth Circuit reversed a district court's invocation of *Rooker-Feldman* as a jurisdictional bar. *Razatos v. Colorado Supreme Ct.*, 746 F.2d 1429 (CA10 1984). In so doing, the Tenth Circuit said that the plaintiff's constitutional challenge to a lawyer discipline rule was not "inextricably intertwined" with the decision of the Colorado Supreme Court because the federal court did not need to review the decision of the state court in order to evaluate the plaintiff's claim. *Id.*

Lower federal courts have also struggled to apply *Rooker-Feldman* in other contexts. For example, in *Centres v. Town of Brookfield*, 148 F.3d 699 (CA7 1998), the state court upheld a local zoning board's denial of a building permit and the plaintiff brought a takings claim in federal court. The Seventh Circuit decided that *Rooker-Feldman* was inapplicable because the plaintiff was complaining of an injury at the hands of the zoning board rather than at the hands of the state court. On that basis, the Seventh Circuit ruled that plaintiff's federal claim was not "inextricably intertwined" with the state court decision and could therefore proceed. On the other hand, in *Garry*, *supra*, the state court granted a condemnation order and plaintiffs sued in federal court alleging the order had been politically motivated. The Seventh Circuit ruled the federal suit barred by *Rooker-Feldman*. The court reasoned that the injury only became complete when the state ordered the condemnation, and that the plaintiff's injury was thus "inextricably intertwined" with the state court judgment.

The basic disagreement among lower federal courts concerns the breadth of the "inextricably intertwined"

formula. A recent Ninth Circuit decision aptly illustrates the disagreement among lower federal courts in this regard:

> If issues presented in a federal suit are "inextricably intertwined" with issues presented in a forbidden de facto appeal from a state court decision, *Rooker-Feldman* dictates that those intertwined issues may not be litigated. . . . But the issues in Kougasian's four causes of action are not "inextricably intertwined" within the meaning of *Rooker-Feldman*. In an ordinary language sense, the issues in Kougasian's claims are indeed "inextricably intertwined" with the issues in *Kougasian I* and *II*. But, as we explained in *Noel v. Hall*, "inextricably intertwined" has a narrow and specialized meaning in the *Rooker-Feldman* doctrine. . . .
>
> Some of our sister circuits have read the "inextricably intertwined" language of *Rooker-Feldman* more broadly. . . . Such a broad meaning of the phrase "inextricably intertwined," however, is not warranted by the Supreme Court's decision in *Feldman*, where the phrase originated. Nor is it warranted by the function of the *Rooker-Feldman* doctrine in our federal system. As applied in *Feldman*, the "inextricably intertwined" test was used to prevent Feldman, the federal plaintiff, from raising, in the non-appeal part of his suit, issues that he was prevented from litigating in his forbidden de facto appeal. In that setting, the "inextricably intertwined" test made good sense, for it prevented Feldman from making an end-run around the rule against de facto appeals. But the "inextricably intertwined" test does not mean that a federal plaintiff can never raise issues that are "inextricably intertwined" with issues already decided in completed state court litigation.

> If that were so, *Rooker-Feldman* would in some cases give greater preclusive effect to state court judgments than the states themselves would give those judgments. Such super-preclusive effect would violate the requirement of 28 U.S.C. § 1738 that federal courts give the same (not more and not less) preclusive effect the rendering state courts would give to those judgments. . . . Similarly, if the "inextricably intertwined" test means that a federal plaintiff cannot raise issues that are "inextricably intertwined" with issues raised in simultaneous ongoing state court litigation, *Rooker-Feldman* would prevent the parallel state and federal litigation that is one of the hallmarks of our federal system . . .

Kougasian v. TMSL, Inc., 359 F.3d 1136 (CA9 2004) (citations omitted).

The Ninth Circuit's narrow interpretation of "inextricably intertwined" is consistent with that of some other circuits, but at odds with that of others. In that regard, the Third and Tenth Circuits take a similarly conservative view of "inextricably intertwined". *See e.g.*, *Bass v. Butler*, 224 F.Supp.2d 950 (E.D. Pa. 2002); *Parkview Assoc. Partnership v. City of Lebanon*, 225 F.3d 321 (CA3 2000); *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163 (CA10 1998); *Weis Builders, Inc. v. Kay S. Brown Living Trust*, 236 F.Supp.2d 1197 (D. Colo. 2002).

On the other hand, the Second Circuit has adopted a broader interpretation of "inextricably intertwined", saying:

> "inextricably intertwined" means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either the plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred

> under the *Rooker-Feldman* doctrine if it would be barred under the principles of preclusion.

Moccio v. N.Y. State Office of Ct. Adm., 95 F.3d 195 (CA2 1996). The Second Circuit's broad interpretation of "inextricably intertwined" is shared by the First, Seventh, Eighth and Eleventh Circuits. *See Wang v. N.H. Bd. of Regist. in Med.*, 55 F.3d 698 (CA1 1995); *Johnson v. Supreme Ct. of Ill.*, 165 F.3d 1140 (CA7 1999); *Bechtold v. City of Rosemount*, 104 F.3d 1062 (CA8 1997); *Blue Cross & Blue Shield of Md., Inc. v. Weiner*, 868 F.2d 1550 (CA11 1989).

This case presents the ideal vehicle for the Court to provide guidance on the scope and proper application of the *Rooker-Feldman* doctrine and to establish the contours of the "inextricably intertwined" formula. As such, Petitioners respectfully request that the Court grant certiorari to review the Sixth Circuit's clearly erroneous decision.

II. THE SIXTH CIRCUIT'S REFUSAL TO APPLY THE *ROOKER-FELDMAN* DOCTRINE IS AN OPEN INVITATION FOR PARTIES TO SPLIT THEIR CAUSES OF ACTION BETWEEN STATE AND FEDERAL COURTS, IN DEROGATION OF WELL-ESTABLISHED PUBLIC POLICIES

A. Because Chipman's substantive due process claim only succeeds to the extent that the Kentucky Supreme Court was wrong in deciding Black was not in custody, the Sixth Circuit should have abstained under the *Rooker-Feldman* doctrine.

The Sixth Circuit addressed issues which had previously been decided by the Kentucky Supreme Court. In so doing, the Sixth Circuit adjudicated federal claims that are inextricably intertwined with issues previously decided by

the Kentucky Supreme Court, in direct contravention of the *Rooker-Feldman* doctrine.

Under the *Rooker-Feldman* doctrine, lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate federal claims which are "inextricably intertwined" with issues decided in state court proceedings. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Feldman, supra*; *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386 (CA6 2002). For purposes of the *Rooker-Feldman* doctrine:

> The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil, supra; *Keene Corp. v. Cass*, 908 F.2d 293 (CA8 1990); *Catz v. Chalker*, 142 F.3d 279 (CA6 1998).

By this standard, the Sixth Circuit should have abstained from ruling on Chipman's federal claim. Chipman's federal and state claims are inextricably intertwined such that the federal claim could only succeed to the extent that the judgment of the Kentucky Supreme Court is wrong.

Specifically, Chipman asserted a federal claim, pursuant to 42 U.S.C. §1983, alleging that the individual officers deprived Black of her constitutional right to substantive due process. In that regard, Chipman argued that the officers failed to protect Black, inasmuch as they did not prevent her from leaving the scene of the traffic stop with

the intoxicated Kritis. The elements of Chipman's claim are well-established under federal case law:

> The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [a person's] freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

DeShaney v. Winnebago Co. Dept. of Social Services, 489 U.S. 189 (1989); *Cherrington v. Skeeter*, 344 F.3d 631 (CA6 2003). In other words, for purposes of Chipman's federal claim, the pivotal issue in determining whether the officers had a constitutional duty to protect Black from Kritis is whether Black was in custody during the traffic stop.

That very issue was also essential to Chipman's state law negligence claim. Under Kentucky law, a police officer has no affirmative duty to protect a citizen from injuries perpetrated by a third person in the absence of a "special relationship" between the police officer and the citizen. A "special relationship" exists if the citizen is "in state custody or otherwise restrained by the state at the time in question". *Asiby, supra*; *Fryman, supra*.

The critical analyses of Chipman's federal and state claims involve precisely the same issue, i.e., whether Black was in custody when she left the scene of the traffic stop with Kritis. In its February 22, 2001, Opinion, the Kentucky Supreme Court addressed that issue:

> Black remained in the Stemler automobile during the traffic investigation stop and she asked to

> leave the scene with Kritis. She also walked on her own to the Kritis truck despite being intoxicated. She was not physically placed in the vehicle by any of the officers and she was not given a threat by any of the officers either to leave with Kritis or face arrest. The consequence is that Black *was never in custody* or otherwise restrained so as to give rise to a special relationship between the police officers and Black. . . . *The record indicates that the police officers did not exercise sufficient control over Black to establish that she was in custody.* The fact that she was a passenger in a motor vehicle stopped in a police investigation did not establish custody. The evidence indicates that the officers did not make any threat of arrest to Black or in any way attempt to coerce her decision as to how she would leave the scene of the traffic investigation. Black repeatedly requested that she be allowed to leave the scene with Kritis, her boyfriend. She walked unassisted to the Kritis truck and thanked an officer for his courtesy in holding the door for her.

City of Florence v. Chipman, 38 S.W.3d 387, 392-393 (emphasis added).

The Sixth Circuit's subsequent adjudication of that very same issue, was nothing more than a determination that the Kentucky Supreme Court was wrong. Indeed, Chipman's argument before the Sixth Circuit was premised on the assumption that the Kentucky Supreme Court's decision was wrong. In that regard, Chipman maintained:

> " . . . the Kentucky Supreme Court, in a 6 to 1 decision, made numerous incorrect conclusions."
>
> " . . . It is devastating to counsel and his clients that the Kentucky Supreme Court can not only

> be so wrong, but not properly cite the record from the Sixth Circuit."
>
> " . . . the Kentucky Supreme Court issued a ruling with all due respect to that Court, devoid of the reality of what the Sixth Circuit reviewed."
>
> " . . . the Kentucky Supreme Court decision was clearly erroneous and works a manifest injustice."

Amended Final First Brief of Appellants / Cross-Appellants, pp. 5, 13, 23-24, 28. In addition, Chipman refers to the Kentucky Supreme Court opinion as a "bad decision". *Id.* at p. 27.

There can be no question that the Sixth Circuit infringed upon the *Rooker-Feldman* doctrine when it "overruled" the Kentucky Supreme Court's decision that Black was not in custody during the traffic stop.

B. The Sixth Circuit's decision is an open invitation for parties to split their claims between federal and state courts, in derogation of the principals underlying the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine is derived from two U.S. Supreme Court cases decided nearly sixty years apart. *See Feldman, supra*; *Rooker, supra*. According to the *Rooker-Feldman* doctrine, "a U.S. District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the U.S. Supreme Court]." *Powell v. Powell*, 80 F.3d 464 (CA11 1996). The doctrine expresses the principle that federal courts are courts of original jurisdiction that do not sit in an appellate capacity with respect to state courts. *See* 28 U.S.C. §1331; 28 U.S.C. §1257.

The *Rooker-Feldman* doctrine is grounded in federalism, comity and the premise that state courts are not inferior to federal courts. In that regard, courts have noted:

> In our federal system, a state trial court's interpretation of federal law is no less authoritative that that of the federal court of appeals in whose circuit the trial court is located.

Powell, supra; *Lockhart v. Fretwell*, 506 U.S. 364 (1993). In the same vein, the Fourth Circuit said:

> The *Rooker-Feldman* doctrine preserves a fundamental tenet in our system of federalism that, with the exception of habeas cases, appellate review of state court decisions occurs first within the state appellate system and then in the United States Supreme Court. . . . A litigant may not circumvent these jurisdictional mandates by instituting a federal action which, although not styled as an appeal, 'amounts to nothing more than an attempt to seek review of [the state court's] decision by a lower federal court' . . . . For purposes of *Rooker-Feldman*, 'the controlling question . . . is whether a party seeks the federal district court to review a state court decision and thus pass upon the merits of that state court decision.'

Amer. Reliable Ins. Co. v. Stillwell, 336 F.3d 311 (CA4 2003) (citations omitted).

In addition, like other preclusion doctrines, the *Rooker-Feldman* doctrine serves the important purpose of "ensuring that litigants do not take multiple bites at the same apple. Once litigants' claims have been adjudicated in the state court system, they should not have access to the entire federal court system." *Guarino v. Larsen*, 11 F.3d 1151 (CA3 1993).

The Sixth Circuit's decision allowing Chipman's federal claim to proceed – even though the issues dispositive of his federal claims have been fully and finally adjudicated in the Kentucky court system – strikes at the very purposes of the *Rooker-Feldman* doctrine. The decision sends a message that the Kentucky courts did an inadequate job of deciding whether Black was in custody during the traffic stop. The decision allows Chipman to have two "bites at the apple" with potentially contradictory results. But more importantly, the decision provides precedent upon which future litigants will no doubt rely to forum-shop, split causes of action and secure multiple trials of claims that arise out of the same set of facts.

In the interest of preserving the *Rooker-Feldman* doctrine and the purposes underlying it, Petitioners respectfully request that the Court grant certiorari to review the Sixth Circuit's clearly erroneous decision.

III. THE SIXTH CIRCUIT'S GROSS MISAPPLICATION OF KENTUCKY LAW DEFINING WHAT CONSTITUTES "THE SAME CAUSE OF ACTION" FOR PURPOSES OF CLAIM PRECLUSION ANALYSIS FLIES IN THE FACE OF KENTUCKY'S LONG-ESTABLISHED PUBLIC POLICY

The U.S. Supreme Court has held that the same preclusion principles govern a §1983 action as any other kind of action. *Allen v. McCurry*, 449 U.S. 90 (1980); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984). The preclusive effect of a prior state decision is normally determined by state law, and a federal court must give the same preclusive effect to state decisions as would the state court. *Kremer v. Chemical Constr. Co.*, 456 U.S. 461 (1982); *Marrese v. Amer. Acad. of Orthopaedic*

Surgeons, 470 U.S. 370 (1985). The rule that a federal court must follow state law in evaluating the preclusive effect of a state court judgment is rooted in the "Full Faith and Credit" Clause of Article IV, Section 1, of the U.S. Constitution, and 28 U.S.C. §1738, which requires "federal courts to give preclusive effect to state-judgments whenever the courts of the state from which the judgments emerged would do so." *Haring v. Prosise*, 462 U.S. 306 (1983); *McAdoo v. Dallas Corp.*, 932 F.2d 522 (CA6 1991).

In refusing to afford preclusive effect to the Kentucky Supreme Court's decision in the Chipman case, the Sixth Circuit grossly misapplied Kentucky law regarding claim preclusion. The Sixth Circuit relied on *Barnes v. McDowell*, 848 F.2d 725 (CA6 1998), for the proposition that "Kentucky courts do not apply the doctrine of claim preclusion in a subsequent suit involving facts already at issue in another action where the causes of action in the two proceedings are not the same," even though *Barnes* is directly at odds with longstanding Kentucky precedent on this point. App. 14. Faced with a conflict between *Barnes* and Kentucky precedent, the Sixth Circuit elected to apply *Barnes* rather than certify the question concerning the application of Kentucky law to the Kentucky Supreme Court. Citing *Barnes*, the Sixth Circuit ruled that claim preclusion did not apply to Chipman's substantive due process claim because the state court wrongful death negligence claim "was not the same cause of action" as the substantive due process claim. App. 15. Proper application of Kentucky law would certainly have led to a different conclusion.

In determining if two causes of action are "the same" for purposes of claim preclusion analysis, Kentucky courts employ a transactional approach which looks beyond the

legal theories asserted to see if the two causes of action stem from the same underlying factual circumstances. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998); *Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994); *Dennis v. Bullitt Fiscal Ct.*, 784 S.W.2d 608 (Ky. App. 1990); *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985). In that regard, under Kentucky law:

> The key inquiry in determining whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits contain the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

Yeoman, supra. The Sixth Circuit's superficial analysis of Kentucky law on claim preclusion completely ignored the transactional approach and, consequently, yielded an opinion which is strikingly contrary to Kentucky law and Sixth Circuit opinions interpreting Kentucky law on this important issue.

Kentucky law on this issue is discussed at length in *Harris v. Ashley*, 165 F.3d 27 (CA6 1998) (unpublished). In that case, Harris worked as a staff attorney for the Kentucky Department of Financial Institutions but was discharged for violating various departmental rules, falsifying time and attendance records, inadequate job performance, and failing to conduct herself in a professional manner. After she was discharged, Harris filed an action in state court under the Kentucky Whistleblower Act, in which she alleged that her employer ignored her reports about program mismanagement and retaliated against her for making those reports. The state court

dismissed Harris' claim for failure to prosecute and failure to provide discovery. Harris appealed the dismissal of her state court action to the Kentucky Court of Appeals. While her appeal was pending, Harris filed a second action in state court pursuant to 42 U.S.C. §1983, alleging that she was terminated in retaliation for exercising her First Amendment rights and seeking monetary and injunctive relief. The second action named the same defendants and was based on the same set of facts as the first action. The defendants removed the second action, which was premised on 42 U.S.C. §1983, to federal court. The federal district court then dismissed the second action on the grounds that it was barred by either *res judicata* or the *Rooker-Feldman* doctrine. The Sixth Circuit affirmed the district court's dismissal of the second action on the basis of claim preclusion. In so doing, the Sixth Circuit summarized pertinent Kentucky law as follows:

> Although *res judicata* requires an identity of claims, the doctrine will apply not only to issues which were actually raised and litigated, but also to any issues which might reasonably have been litigated. . . . In other words, *res judicata* applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time . . .

Id. at 3 (citations omitted).

The *Harris* Court reasoned as follows:

> Applying Kentucky law to the case at hand, it is obvious that Harris's prior whistleblower suit involved the same transaction as her current § 1983 suit: namely, her vocal criticism of the

> Kentucky Department of Financial Institutions and her supervisor's decision to discharge her, allegedly in retaliation for that criticism. Harris's right to speak out without being subjected to retaliation was the core issue of the prior action, just as surely as it is the core issue of this subsequent action. Harris cannot claim that her First Amendment right to free speech was 'not germane to, implied in or essentially connected with the actual issues' of her prior whistleblower suit, because both suits concern the same allegedly wrongful act. *It is true that Harris now plies her claim under a different legal theory that implicates federal constitutional rights, but it is a claim she could have and should have brought in her prior suit . . .*

Id. at 4 (emphasis added) (citations omitted).

As the *Harris* Court also noted, Kentucky courts follow the Restatement (Second) of Judgments §24, which provides as follows:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendants with respect to all or any parts of the transaction, or series or connected transactions, out of which the action arose.

Id. at 3, quoting Restatement (Second) of Judgments §24.

Under the transactional approach, a Kentucky court determines whether there is an identity of causes of action by looking first to the dimension or scope of the claim in the first cause of action. *Id.* at 3. State courts in Kentucky follow the Restatement (Second) of Judgments §24 and discuss this aspect of *res judicata* in terms of the rule against splitting claims. *Id. See Watts*, *supra* (describing

the rule against splitting causes of action as a "subsidiary" of the doctrine of *res judicata*); *Kirchner v. Riherd*, 702 S.W.2d 33 (Ky. 1985) (applying the rule against splitting claims in the context of *res judicata*); *Dennis*, *supra*; *Egbert*, *supra*. In assessing the dimension or scope of the claim asserted in the first cause of action, a Kentucky court examines the second action and determines if it involves issues which should have been litigated in the first. *Id.*

For example, in *Dennis*, a police officer brought a §1983 claim in federal court alleging his discharge from the police department violated his federal constitutional rights. After his §1983 claim was dismissed on the basis of the statute of limitations, Dennis brought another action in state court alleging that his discharge constituted a breach of contract, a violation of personnel policies, and a violation of the state constitution. Applying Kentucky law, the state appellate court held that Dennis' federal and state actions were the same for *res judicata* purposes. The Court explained:

> The issue in the instant action therefore is whether appellant's federal and state actions are the same for *res judicata* purposes. The Restatement (Second) of Judgments §24, comment a, speaks to this issue as follows: 'The present trend is to see claim in factual terms and to make it conterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.'

> Moreover, the rule against splitting causes of action recognized in the Restatement (Second) of Judgments §24 applies 'even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action.' Restatement (Second) of Judgments §25.

Dennis, supra at 610.

Recently, the Kentucky Supreme Court reaffirmed the application of claim preclusion and the subsidiary doctrine against splitting causes of action:

> The doctrine of *res judicata* (also known as a doctrine of finality of judgments) is basic to our legal system and stands for the principle that once the rights of the parties have been finally determined, litigation should end. Thus, where there is an identity of parties and an identity of causes of action, the doctrine precludes further litigation of issues that were decided on the merits in the final judgment . . . Although the doctrine does not act as a bar in a subsequent proceeding if the issues or questions of law are different, a corollary of the doctrine is that a party may not split a cause of action. As a result, a final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment, but also of matters included within those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time.

Whittaker v. Cecil, 69 S.W.3d 69 (Ky. 2002).

As set forth above, Kentucky law required the Sixth Circuit to give preclusive effect to the Kentucky Supreme Court's judgment with respect to Chipman's claim. Without question, Chipman's state and federal lawsuits both

arose from the same transactional nucleus of facts and therefore concern the same controversy. As a result, Chipman's state law action, now final by virtue of the Kentucky Supreme Court's judgment, is deemed under Kentucky law to have adjudicated every matter which was or could have been brought under the same set of facts. One need only look at the allegations in the Complaints filed in Chipman's federal and state actions – which are set forth identical to each other – to ascertain that the two actions arise from the same set of facts.

Contrary to the Sixth Circuit's ruling, the causes of action in the federal and state lawsuits are "the same" as defined by Kentucky law. All of Chipman's claims arise from the allegation that the defendant officers "forced by threats and assisted Connie Black, against her will, to become a passenger in Steve Kritis' truck" which Kritis later crashed, killing Black.

Since Kentucky courts have concurrent jurisdiction over Chipman's §1983 claims, Chipman could have brought those claims in the state court action but chose not to. Like the plaintiff in *Dennis*, *supra*, Chipman brought two successive suits seeking legal redress for the same allegedly wrongful act. Here, as in *Dennis*, the only difference between the two suits was that one sought relief under federal law while the other sought relief under state law. This type of splitting causes of action is not allowed under Kentucky jurisprudence, and the Sixth Circuit committed grievous error in its misapplication of Kentucky law.

The Sixth Circuit also seriously misapplied Kentucky law in determining that Stemler's federal case was not precluded by the Kentucky Court of Appeals' decision, which Stemler did not further appeal. The district court

refused to grant summary judgment to Officer Wince, holding that claim preclusion did not apply to Stemler's fabrication of evidence and excessive force claims. The Sixth Circuit upheld the district court's decision with little explanation, stating only that the fabrication of evidence and excessive force claims were not "identical causes of action to those brought in federal court." App. 22a. Again, the Sixth Circuit misapplied Kentucky law on claim preclusion, and particularly that portion of the law which defines the identity of claims and causes of action.

There is no dispute that Stemler's fabrication of evidence and excessive force claim arise from the same nucleus of facts as Stemler's state law claims for malicious prosecution, false arrest, false imprisonment, abuse of process, assault and battery, and intentional or negligent infliction of emotional distress. Stemler filed Complaints in both forums alleging the same facts. Specifically, both lawsuits are based on Officer Wince's arrest of Stemler on February 19, 1994.

In its most recent opinion, the Sixth Circuit held that Stemler's equal protection claim was barred by the doctrine of issue preclusion since the state court had determined in dismissing Stemler's malicious prosecution claim that the officers had no improper motive in initiating charges against her. App. 18a. Yet, after properly applying Kentucky law on claim and issue preclusion to these claims, the Sixth Circuit failed to properly apply claim preclusion to the fabrication of evidence and excessive force claims.

The source of the Sixth Circuit's error was its failure to apply Kentucky's well-established definition of "the same cause of action." According to the Kentucky decisions and the Restatement previously cited herein, Stemler

could have brought her fabrication of evidence and excessive force claims in the state court action. Had the Sixth Circuit properly applied the test set forth in case after case of Kentucky precedent, it would have found that Stemler's claims were barred by claim preclusion and the improper splitting of her causes of action. It is beyond argument that, under Kentucky law and its transactional approach to determine whether there is a sufficient identity of causes of action to apply claim preclusion, Stemler's claims in both federal and state court stem from the same underlying factual circumstances. *Dennis*, *supra*. Of course, "the key inquiry in determining whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts." *Yeoman*, *supra*. Therefore, Stemler, like Chipman, was required to bring all of her claims in the previously filed and now finally adjudicated state court action:

> When the Plaintiff brings an action on the claim in the court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and a judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.

Heylinger v. State Univ. and Comm. College Sys. Of Tenn., 126 F.3d 849 (CA6 1997).

The Sixth Circuit's gross misapplication of Kentucky law is an affront to the important public policies served by the doctrine of *res judicata* and the corollary rule against splitting causes of action. As the U.S. Supreme Court noted in *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931), "Public policy dictates that there be an end of litigation; that those who have contested an issue

shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *See also Creamtop Creamery v. Dean Milk Co.*, 383 F.2d 358 (CA6 1967). "The basic premise is that a plaintiff must recover all damages arising from given operative facts in a single action." *Id.* at 363.

Clearly, the Sixth Circuit erred when it refused to recognize that Chipman's federal claims were barred under the doctrine of *res judicata*. Considering the magnitude of prejudice that has resulted from the Sixth Circuit's decision, Petitioners respectfully request that the Supreme Court grant certiorari to review the Sixth Circuit's decision.

CONCLUSION

Since the decision of this Court in *Feldman*, *supra*, in which the "inextricably intertwined" formula was set out, the *Rooker-Feldman* doctrine has been a source of confusion and uncertainty for the lower federal courts and the parties that practice in those courts. This case presents an opportunity for this Court to provide much-needed guidance on the proper purpose, scope and application of the *Rooker-Feldman* doctrine.

In addition, the Sixth Circuit's decision sets binding precedent which disregards all of the interests and purposes served by the *Rooker-Feldman* and *res judicata*, such as the protection of parties from the expense and vexation of multiple lawsuits in multiple forums, the conservation of judicial resources, the prevention of inconsistent verdicts, and comity. If allowed to stand, the decision will serve as an open invitation for litigants to split their causes of action between state and federal courts in an effort to maximize their potential recoveries at the expense of the judiciary and adverse parties, and in

derogation of clear public policy set by Kentucky courts which requires litigants to recover all damages arising from one set of facts in a single action.

To clarify *Rooker-Feldman* and to prevent the Sixth Circuit's erroneous decision from serving as precedent, Petitioners respectfully pray that this Court grant its Petition for Writ of Certiorari.

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350 F.3d 578

United States Court of Appeals,
Sixth Circuit,
Susan STEMLER, Plaintiff-Appellee, William Chipman,
Administrator of the Estate of Conni Black,
Plaintiff-Appellant/Cross-Appellee, Randy Black,
Legal Guardian of Shianne Black,
Intervenor-Appellant/Cross-Appellee,
v.
FLORENCE, City of Florence, Defendant-Appellee,
Bobby Joe Wince, in his official capacity as an Officer of
the Florence Police Department; John Dolan, in his official
capacity as an Officer of the Florence Police Department;
Thomas Dusing, in his official capacity as an Officer of the
Florence Police Department, Defendants-Appellees/
Cross-Appellants, Ron Kenner, in his official capacity
as Boone County Sheriff, Defendant.
Susan Stemler, Plaintiff-Appellee, Randy Black,
Intervenor-Appellee/Cross-Appellant
v.
Florence, City of Florence, Defendant, Bobby Joe Wince,
in his official capacity as an Officer of the Florence Police
Department; John Dolan, in his official capacity as an
Officer of the Florence Police Department;
Thomas Dusing, in his official capacity as an
Officer of the Florence Police Department,
Defendants-Appellants/Cross-Appellees.
Nos. 01-5956, 01-6205.
argued Dec. 5, 2002.
Decided and Filed Dec. 2, 2003.
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David Whalin (briefed), Landrum & Shouse, Louisville, KY, for Defendants.

Before: BOGGS, Chief Judge; and SILER and GIBBONS, Circuit Judges.

OPINION

BOGGS, Chief Judge.

Appellant/cross-appellee William Chipman, administrator of the estate of Conni Black, and intervenor-appellant/cross-appellee Randy Black appeal the district court's order granting summary judgment for the defendants in this civil action arising out of an encounter between Conni Black and Susan Stemler, on the one hand, and police officers from the City of Florence, Kentucky and Boone County, Kentucky. Appellees/cross-appellants Bobby Joe Wince, John Dolan, and Thomas Dusing appeal the denial of summary judgment on Susan Stemler's claim of violation of equal protection. Wince appeals the denial of summary judgment on Stemler's claims of fabrication of evidence and excessive force.

This case arises out of an incident that occurred on February 19, 1994. We have reviewed this case on a previous appeal. The relevant facts are described at length in *Stemler v. Florence,* 126 F.3d 856 (1997). Briefly, Black was killed in a car accident shortly after police officers allegedly removed her from Stemler's car and placed her in the truck of her boyfriend, Steve Kritis. Both Black and Kritis had been drinking heavily, and after an altercation between them at a bar, Black left with Stemler in Stemler's car. Kritis then began to chase the women on the streets of Florence before both the car and the truck were

stopped by the police after a concerned citizen alerted them to the situation. Stemler was arrested for driving under the influence. Witnesses say that all the police officers present repeated Kritis's assertion that Stemler was a lesbian to each other and to others present. No police officer ever checked Kritis for intoxication or asked him to leave his truck. Black was either escorted or carried from Stemler's car to the passenger seat of Kritis's truck. Kritis then drove away and turned onto the northbound lanes of I-75. According to Kritis, Black, who had passed out, woke up and began to hit Kritis. He began to hit back and lost control of the truck. The truck swerved and collided with the guardrail. Black was partially ejected from the passenger-side window. Her arm was completely severed from her body and her head was split into two parts by some part of the guardrail.

I. The Claims

A. Chipman's claim

On March 7, 1994, William Chipman, the administrator of the estate of Conni Black, filed a wrongful death action in the Boone County Circuit Court against Florence police officers Dusing, Dolan, and Wince; Boone County police officers Rob Reuthe and Chris Alsip; the City of Florence; and Ron Kenner, the Boone County Sheriff. The Boone County Circuit Court entered summary judgment on behalf of the defendants on Chipman's wrongful death claim. *Chipman v. City of Florence,* No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996). The Kentucky Court of Appeals reversed the Circuit Court. *Chipman v. City of Florence,* No.1996-CA-001287-MR (Ky.Ct.App. Nov. 25, 1998). The Kentucky Supreme Court then reversed the Court of Appeals and reinstated the

summary judgment ordered by the Boone County Circuit Court. *City of Florence v. Chipman,* 38 S.W.3d 387 (Ky.2001).

Chipman also filed a complaint in federal court against the same defendants on March 31, 1994.[1] The complaint alleged that the defendants were liable under 42 U.S.C. § 1983 for Black's wrongful death because they had displayed deliberate indifference by forcing her into Kritis's car.[2]

Chipman's federal claims were dismissed by the district court in 1994. The district court granted the individual officers' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim, on the ground of qualified immunity. The district court also granted the motions for summary judgment of Florence and Boone County. *Chipman v. City of Florence,* 858 F.Supp. 87 (E.D.Ky.1994), *reconsideration denied on amended complaint,* 866 F.Supp. 332 (E.D.Ky.1994).

On appeal, we upheld the district court's order granting summary judgment to the municipal defendants, Florence and Boone County. *Stemler,* 126 F.3d at 866. However, we reversed the district court's dismissal of Chipman's claims against the individual officers. We held that Chipman had pled facts sufficient to maintain her substantive due process claim against the individual officers. *Id.* at 870. The only state court decision prior to

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[1] We treated the complaint against Kenner as a suit directly against Boone County. *Stemler,* 126 F.3d at 864 n. 8.

[2] This claim will be referred to as "the substantive due process claim."

our decision was the Boone County Circuit Court decision awarding judgment to the defendant officers, holding that Black was not in custody when the pickup struck the guardrail and that none of the state actors were the direct cause of her death on the highway. We stated in *Stemler* that "[w]hile these findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim." *Id.* at 870 n. 12. The case was remanded to the district court for further proceedings consistent with the opinion.

Shortly after the opinion issued, Randy Black was granted permission to intervene on behalf of Conni Black's minor child, Shianne Black, to bring a claim of loss of parental consortium. At about the same time, the federal district court held the case in abeyance pending a decision by the Kentucky Supreme Court on appeal of the Boone County Circuit court's order entering summary judgment in favor of defendants and the Kentucky Court of Appeals reversal of that order, which was issued February 22, 2001. Chipman later reached a settlement with the Boone County officers. In June 2001, the district court granted the officers' motion for summary judgment on Chipman's substantive due process claim, and Shianne Black's claim for loss of parental consortium. The district court found that the decision of the Kentucky Supreme Court barred their claims under the doctrine of issue preclusion. The issue that the district court found could not be relitigated was whether Black was in "custody" when she got into Kritis's car because, according to the district court, the Kentucky Supreme Court had held that Black was never in custody.

B. Stemler's Claims

Susan Stemler filed a federal complaint, pursuant to 42 U.S.C. § 1983, against officers Wince, Dolan, Dusing, and the City of Florence. The complaint alleged claims of excessive force, wrongful arrest, malicious prosecution, and violation of equal protection on the bases of sex and sexual orientation. The district court granted the officers' Rule 12(b)(6) motions to dismiss on the ground of qualified immunity. The district court then consolidated her case with Chipman's and awarded summary judgment to Florence. The federal district court then entered an order granting Stemler's motion for voluntary dismissal of her excessive force claim against Wince. This voluntary dismissal was entered pursuant to an agreement between the parties to dismiss the claim so that an appeal could proceed in this court. The agreement allowed her to bring her claim again should she be successful upon appeal.

As Chipman did, Stemler had also brought similar claims in Kentucky state court. She raised state-law claims of malicious prosecution, false arrest, abuse of process, assault and battery, false imprisonment, and negligent or intentional infliction of emotional distress. *Stemler v. Florence,* No. 94-CI-00459. The Boone County Circuit Court held that she was precluded from prosecuting all of her claims, except for assault and battery. *See Stemler v. City of Florence,* 126 F.3d 856, 871 (6th Cir.1997). There was ample evidence constituting probable cause for her arrest. This barred her false arrest and malicious prosecution claim. As the defendants were police officers, the court found that there was no distinction between her claims of false arrest and false imprisonment. It also found that her abuse of process claim was barred based on the probable cause finding, that the officers had

no improper motive in arresting her, and that a state prosecutor independently had made the prosecutorial decisions in her criminal case. As for her claims of negligent or intentional infliction of emotional distress, the court found that under Kentucky law, there is no viable cause of action for these torts when she had raised essentially identical claims under traditional torts as discussed above. Finally, the court determined that there was a genuine issue of material fact with respect to her assault and battery claim against Wince, but not against Dusing and Dolan. Stemler later voluntarily dismissed this claim. The Kentucky Court of Appeals affirmed the grant of summary judgment. Stemler did not pursue an appeal.

Upon appeal of the district court decision to this court, we affirmed the grant of summary judgment in favor of the City of Florence. *Stemler,* 126 F.3d at 866. We also affirmed the dismissal of her false arrest and malicious prosecution claims because the Boone County Circuit Court's finding that there had been probable cause to arrest and prosecute Stemler precluded relitigating that issue in this court. *Id.* at 871-72. We noted that although Stemler seemed to be asserting a claim that Wince had falsified evidence against her, and that the state court's finding of probable cause would not preclude her from prosecuting this claim, she had failed to properly plead it. *Id.* at 872. We stated that she would be free to file a new complaint against Wince raising that claim. *Ibid.* Finally, we reversed the dismissal of Stemler's equal protection claim of selective prosecution against the officers, holding that the allegations in her complaint were sufficient to state a claim. *Id.* at 874.

After our opinion in *Stemler* was issued, Stemler amended her complaint to allege that Wince fabricated the

blood sample evidence used in her DUI trials.[3] As it did in Chipman's case, the district court held Stemler's case in abeyance pending final judgments in the state court proceedings. In June 2001, the district court denied the officers' motion for summary judgment on Stemler's claims of denial of equal protection based on selective prosecution, and Wince's motion for summary judgment on her claims of falsification of evidence, and excessive force. The district court noted that none of these claims actually had been litigated in state court. It stated that while it might agree with the defendants that Stemler could and should have brought these claims in state court, our opinion in *Stemler* had implied that claim preclusion did not apply. The court further stated that our holding in *Stemler* stated that she could proceed with these claims, and that the "law of the case" would be violated if it did not permit her to do so.

II. Chipman's substantive due process claim

Chipman argues that our resolution of the custody issue in his favor in *Stemler* should have had preclusive effect on the Kentucky state courts. He argues that our opinion's holdings constituted the "law of the case" and the district court erred in applying the doctrine of issue preclusion based on the state court proceedings. The officers argue that the district court was correct in deciding that issue preclusion barred the relitigation of the issue of custody. Alternatively, they argue that Chipman's

[3] Stemler was twice tried in Boone County District Court on the DUI charge. The first trial ended in a hung jury. She was acquitted at the end of her second trial.

substantive due process claim is barred from further litigation under the *Rooker-Feldman* doctrine, or under the doctrine of claim preclusion.

We review *de novo* a district court's decision with regard to issue preclusion or claim preclusion. *Heyliger v. State Univ. and Cmty. Coll. Sys. of Tenn.*, 126 F.3d 849, 851 (6th Cir.1997); *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir.1995), *cert. denied*, 116 S.Ct. 1848 (1996). When deciding whether to afford preclusive effect to a state court judgment, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires the federal court to give the prior adjudication the same preclusive effect it would have under the law of the state whose court issued the judgment. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Heyliger*, 126 F.3d at 851-52.

Under Kentucky law, "[c]laim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action." *Yeoman v. Kentucky Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky.1998). "Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action." *Ibid.*

A. Issue Preclusion

In order for issue preclusion to apply in Kentucky, (1) the issue in the second case must be the same as the issue in the first case, (2) the issue must have been actually litigated, (3) the issue must have been actually decided, and (4) the decision on the issue in the prior action must have been necessary to the court's judgment. *Ibid.* The district court found that all four factors were met when the Kentucky Supreme Court resolved Chipman's state claims.

In order for Chipman to prevail in the Kentucky state courts, the Kentucky Supreme Court stated that he had to show "the existence of a duty and unless a special relationship was present, there is no duty owing from any of the police officers. . . ." *Chipman,* 38 S.W.3d at 392. The court went on, stating that "[i]n order for the special relationship to exist, two conditions are required: 1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and 2) the violence or other offensive conduct must have been committed by a state actor." *Ibid.* The court held that "[t]here is no evidence from which it can be ascertained that Black was in state custody or otherwise restrained by the police at the time the pickup truck struck the guardrail with the fatal result. In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers." *Ibid.*

The Kentucky Supreme Court also stated that Black was *never* in custody. *Id.* at 393. This is precisely the issue that is relevant in a § 1983 action. In order to prevail on the § 1983 claim, Chipman needs to show that the defendant officers "violated substantive due process by placing [Black] at risk of harm from a third party. . . . " *Stemler,* 126 F.3d at 867. The court must first determine whether "the plaintiff and the state actors had a sufficiently direct relationship such that the defendants owed [Black] a duty not to subject her to danger," and then "the court must also conclude that the officers were sufficiently culpable to be liable under a substantive due process theory." *Ibid.* As to the first part, the relevant inquiry is whether Black was

in custody at the time the officers allegedly forced her into Kritis's truck.

First, the Kentucky Supreme Court stated that there was no evidence in the record to support a finding that Black was ever in custody, the same issue that is necessary to Chipman's federal claim. Second, the custody issue was actually litigated in the state courts: in the Boone County Circuit Court, the Kentucky Court of Appeals and the Kentucky Supreme Court. The Kentucky Supreme Court found that there was no evidence to support a finding that Black was ever in custody in the context of deciding the appeal of a summary judgment motion. A summary judgment order is a decision on the merits. *Ohio Nat'l Life Ins. Co. v. United States,* 922 F.2d 320, 325 (6th Cir.1990). Third, the issue was actually decided by the Kentucky Supreme Court. The court made an explicit statement that there was insufficient evidence to support a finding that Black was in custody.

However, the Kentucky Supreme Court's statement that she was never in custody was not necessary to its judgment. The Boone County Circuit Court held that there was no genuine issue of material fact regarding whether Black was in custody at the time the pickup struck the guardrail – the point at which the injury-producing act occurred. Specifically, it stated she was not in custody at this point. This was the only holding necessary for the affirmance of the Boone County Circuit Court's judgment. As we noted in discussing this lower court decision in *Stemler,* the holdings of the state court on this issue are entitled to preclusive effect. Nonetheless, this precise issue is irrelevant to the substantive due process claim.

As the Kentucky Court of Appeals (now the Kentucky Supreme Court) stated in *Sedley v. City of West Buechel,* 461 S.W.2d 556, 558 (Ky.1971):

> The general rule is that a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is *not conclusive as to matters* which were immaterial or *unessential to the determination* of the prior action or which were not necessary to uphold the judgment.

(Emphasis added).

As the Kentucky Supreme Court correctly stated, our statements in *Stemler* regarding whether Black was in custody were dicta, as the only issue before us at that point was the sufficiency of the allegations in the complaint. Similarly, the statements of the Kentucky Supreme Court regarding whether Black was *ever* in custody are dicta, as they are not necessary to the state courts' disposition of the case. The actual holding of the Kentucky Supreme Court reads:

> In order for a claim to be actionable in negligence, there must be the existence of a duty and unless a special relationship was present, there is no duty owing from any of the police officers to Black to protect her from crime or accident. In order for the special relationship to exist, two conditions are required: 1) the victim must have been in state custody or otherwise restrained by the state *at the time the injury producing act occurred,* and 2) the violence or other offensive conduct must have been committed by a state actor. Neither of these factors can be found from the undisputed material facts in this case. There is no evidence from which it can be ascertained

> that Black was in state custody or otherwise restrained by the police *at the time the pickup truck struck the guardrail with the fatal result.* In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers.

City of Florence v. Chipman, 38 S.W.3d 387, 392 (Ky.2001) (emphasis added and citations omitted).

The Kentucky Supreme Court would have reached the same result if it had found that Black was in custody at the time she entered Kritis's truck, so long as it found she was not in custody at the time the truck hit the guardrail.

The district court erred in finding that issue preclusion barred Chipman's substantive due process claim.

B. Claim Preclusion

The defendant officers also argue that claim preclusion should bar Chipman's claim against them. Claim preclusion bars further litigation under Kentucky law when: (1) there is identity of the parties; (2) there is identity of the causes of action; and (3) the action has been resolved on the merits. *Yeoman,* 983 S.W.2d at 465. *Yeoman* also stated that "[f]or claim preclusion to apply, the subject matter of the subsequent suit must be identical." *Ibid.*

In *Barnes v. McDowell,* 848 F.2d 725 (6th Cir.1988), we stated that "Kentucky courts do not apply the doctrine of claim preclusion in a subsequent suit involving facts already at issue in another action when the causes of

action in the two proceedings are not the same." *Id.* at 730. A district court, interpreting Kentucky law, stated:

> [W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, *the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.*

Presbyterian Child Welfare Agency of Buckhorn v. Nelson County Bd. of Adjustment, 185 F.Supp.2d 716, 720 (W.D.Ky.2001) (quoting *Louisville v. Louisville Professional Firefighters Ass'n,* 813 S.W.2d 804, 807 (Ky.1991)).

While there is identity of the parties, and the action was resolved on the merits, Chipman's claim is not barred, as it is not the same claim as in state court. His claim in the state courts was for wrongful death, which is a negligence claim. This is not the same cause of action as the one he brought in the federal court, a claim of violation of Black's substantive due process rights. It is indeed true that this claim could have been brought in state courts. However, under the Kentucky law of claim preclusion, this does not matter, as there is no identity of the causes of action. *Yeoman,* 983 S.W.2d at 465. Chipman's federal claim is not barred by claim preclusion.

C. *Rooker-Feldman*

The defendant officers also argue that the federal district court lacked jurisdiction to consider Chipman's claim under the *Rooker-Feldman* doctrine. They argue that Chipman's federal suit is an attempt to appeal a state court decision to the federal courts.

The doctrine gets its name from two Supreme Court cases. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), held that the power to hear appeals from state court judgments is exclusively held by the United States Supreme Court. The Supreme Court held in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), that federal district courts do not have jurisdiction to hear challenges to certain state-court decisions. The *Rooker-Feldman* doctrine states that "lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. Berkley,* 305 F.3d 386, 390 (6th Cir.2002). In defining "inextricably intertwined," we have adopted the reasoning that:

> [t]he federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Id. at 391 (quoting *Catz v. Chalker,* 142 F.3d 279, 293 (6th Cir.1998)). In *Peterson Novelties,* we held that the *Rooker-Feldman* doctrine was inapplicable to claims that the state

court did not address or rule upon even though the federal claims arose out of the same nucleus of facts. *Id.* at 391-93. Therefore, the question is whether this court could hold that the officers violated Black's constitutional rights without implicitly holding that the state court wrongly decided the issues before it. *Id.* at 393.

This court discussed the *Rooker-Feldman* doctrine and its frequent conflation with claim and issue preclusion in *Hutcherson v. Lauderdale County,* 326 F.3d 747 (6th Cir.2003). This court stated that Seventh Circuit case law provided a useful way to determine which doctrine to apply:

> In order to determine the applicability of the *Rooker-Feldman* doctrine, the fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment. If the injury alleged resulted from the state court judgment itself, *Rooker-Feldman* directs that the lower federal courts lack jurisdiction. If the injury alleged is distinct from that judgment, i.e., the party maintains an injury apart from the loss in state court and not "inextricably intertwined" with the state judgment, . . . res judicata may apply, but Rooker-Feldman does not. . . .

Id. at 755 (quoting *Garry v. Geils,* 82 F.3d 1362, 1365-66 (7th Cir.1996)).

As Chipman is not directly challenging the state court's judgments in federal court, the doctrines of claim and issue preclusion are more properly applied to this case. However, in any case, the *Rooker-Feldman* doctrine does not apply. The Kentucky Supreme Court's discussion

of whether Black was ever in custody was dicta, and therefore any finding by the federal court that Black was in custody at some point during the encounter would not implicitly hold that the state court improperly decided *the issues before it.* The issue of Black's custody before the truck hit the guardrail was not an issue that was salient before the Kentucky court.

The district court does have jurisdiction to hear Chipman's substantive due process claim.

III. Stemler's Claims

A. Equal Protection Claim

The defendants argue that Stemler's equal protection claim is barred by claim preclusion, issue preclusion, and the *Rooker-Feldman* doctrine. The district court, although inclined to rule that her claim was barred by claim preclusion, instead decided that this court's decision in *Stemler* precluded the application of any of those doctrines. We first note that the district court was not required to abstain from analyzing Stemler's claims under the claim preclusion doctrine because of our previous opinion. Our opinion was issued while Stemler's appeal was pending with the Kentucky Court of Appeals. We stated that *at that point,* claim preclusion did not yet apply to her claims before the federal courts. We nowhere said that claim preclusion would never apply.

The defendant officers argue that the Kentucky Court of Appeals decision conclusively decided the question of whether they had acted with improper motive in arresting her. The Court of Appeals stated that "[a]lthough the officers may have been crude during Stemler's arrest, we

agree with the circuit court that Stemler cannot establish that they acted with an improper motive." *Stemler v. City of Florence,* No.1996-CA-001318-MR at 23. The court made this statement in the context of discussing the propriety of summary judgment regarding Stemler's abuse of process claim. One of the essential elements of that tort is an ulterior purpose. *Bonnie Braes Farms, Inc. v. Robinson,* 598 S.W.2d 765, 766 (Ky.Ct.App.1980). It was one of several findings of fact that supported the granting of summary judgment in favor of the defendants.

Stemler argues that our statement in our opinion in *Stemler* that "the record evidence supports a finding" that the officers chose to arrest her because they believed her to be a lesbian should have had preclusive effect on the Kentucky state courts. However, this statement was dicta. We reversed the district court's dismissal of her claim on a 12(b)(6) motion. Thus the only question before our court was whether her complaint adequately stated an equal protection claim. A dismissal pursuant to 12(b)(6) "is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief." *Kostrzewa v. City of Troy,* 247 F.3d 633, 638 (6th Cir.2001). That judgment does not preclude a later summary judgment motion, arguing that the plaintiff *in fact* could not show such evidence. In state court, the claim was being considered for summary judgment purposes. A summary judgment order is a decision on the merits. *Ohio Nat'l Life Ins. Co.,* 922 F.2d at 325. Thus the issue was actually litigated in the state courts. And, as the state court made an explicit finding that the officers had no improper motive, the issue was actually decided.

In order to maintain a claim of selective prosecution (the basis of Stemler's equal protection claim), the plaintiff

must prove that a state actor initiated the prosecution with a discriminatory purpose. This is the same issue as the ulterior purpose issue in Stemler's state claim of abuse of process. And finally, the issue was necessary to the resolution of the state claim. Thus, the state court's finding that the officers did not have an improper motive in arresting Stemler has preclusive effect on relitigating that issue in the federal courts.

Because Stemler's equal protection claim is barred by issue preclusion, the district court should have granted summary judgment to the officers on that claim.

B. Excessive Force

Stemler's federal claim of excessive force and her state claim of assault and battery against Wince were voluntarily dismissed so that she could appeal unfavorable lower court decisions on other claims. Wince first argues that Stemler has never taken any action to revive her federal claim. However, Stemler's Second Amended Complaint was accepted by the district court on January 13, 1998. Her Second Amended Complaint incorporated by reference her initial complaint and her First Amended complaint, which included the excessive force claim. Furthermore, Wince does not explain why he did not make this argument when he moved the district court for summary judgment on this claim, and why the district court denied his summary judgment motion without ever addressing this issue.

Wince next argues that the voluntary dismissal agreement bars Stemler from reviving her excessive force claim because it bars her from reviving her assault and battery claim. The agreement stated that if her appeal to

the state appellate court on her other state claims was unsuccessful, then her assault and battery claim could not be revived, and vice versa. It similarly stated that if her appeal to the federal appellate court was unsuccessful, then her excessive force claim could not be revived, and vice versa. He argues that because both claims rely on the same facts and elements of proof, the dismissal of her state law claims bars her from reviving her assault and battery claims.

First, a voluntary dismissal of a claim is not a judgment on the merits. Ky. R. Civ. P. 41.01. While Stemler's assault and battery claim was dismissed with prejudice against Dolan and Dusing, the state court did not grant summary judgment to Wince, and issue preclusion does not apply to her claim against Wince. Second, the agreement itself does not bar her from bringing her federal claim. As she was not successful on appeal in the state courts, the agreement would seem to bar her from bringing her assault and battery claim again in state courts. However, the agreement addressed her federal and state claims separately. The agreement did not say that if she was unsuccessful in the state courts that she was barred from bringing her federal excessive force claim again. The agreement that bars her from bringing her state assault and battery claim is not a judgment for the purposes of issue preclusion, as Wince seems to argue.

Wince next argues that the *Rooker-Feldman* doctrine barred the district court from considering Stemler's claims since any decision favorable to her would have been an impermissible review of issues decided adversely to her in the Kentucky state court. He also argues that the claim preclusion doctrine bars her from relitigating this claim in the federal courts as well. We will discuss the application

of these doctrines below in conjunction with Stemler's other outstanding claim.

C. The application of claim preclusion and the *Rooker-Feldman* doctrines to Stemler's Fabrication of Evidence and Excessive Force Claims

Wince argues that Stemler's excessive force and fabrication of evidence claims should be barred by claim preclusion and the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine, as previously noted, states that "lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims 'inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties,* 305 F.3d at 390. The question for this court is whether a federal court can rule in Stemler's favor on her federal claims without implicitly holding that the state courts wrongly decided the issues before them. *Id.* at 393.

The state courts adjudicated several of Stemler's claims. As noted above, Stemler's claims of malicious prosecution and false arrest and imprisonment were dismissed on summary judgment because the state court held that there was no genuine issue that probable cause existed for her DUI arrest. Her claims of intentional or negligent infliction of emotional distress and outrage were dismissed on summary judgment because Kentucky law holds that if a claimant raises claims under traditional torts that allow recovery for emotional distress, the claimant cannot raise claims of intentional or negligent infliction of emotional distress or outrage. The Boone County

Circuit Court found that there was a genuine issue of material fact as to her assault and battery claim against Wince.

Except for the decision refusing to dismiss her assault and battery claim against Wince, the Kentucky state courts never considered or ruled on any elements of the claims of fabrication of evidence or excessive force, nor did they address any facts or issues regarding these claims. The state courts confined themselves to the issues of probable cause and the motive for Stemler's arrest. The district court could rule in Stemler's favor without even implicitly holding that the Kentucky courts wrongly decided the issues before them. The *Rooker-Feldman* doctrine does not apply to these claims, and the district court has jurisdiction to hear them.

Wince also argues that claim preclusion would bar Stemler from bringing these claims in federal court, because as she could have brought them in state court. However, as discussed above, the Kentucky law of claim preclusion only bars bringing the *same* cause of action twice. Stemler's claims for falsification of evidence and excessive force could have been brought in state court and were not. However, under Kentucky law, as she did not bring identical causes of action in state court, she is not barred from bringing them in federal court. *Yeoman,* 983 S.W.2d at 465. The district court did not err when it decided that claim preclusion did not apply to these claims.

IV. Conclusion

In No. 01-5956, we REVERSE the grant of summary judgment to the defendants on Chipman's substantive due

process claim. In No. 01-6205, we REVERSE the denial of summary judgment with regard to Stemler's equal protection claim. We AFFIRM the denial of summary judgment with regard to Stemler's excessive force and falsification of evidence claim. Both cases are REMANDED to the district court for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-5956/6205

No. 01-5956

SUSAN STEMLER,
Plaintiff-Appellee,
WILLIAM CHIPMAN, Administrator of
the Estate of Conni Black,
Plaintiff-Appellant/Cross-Appellee,
RANDY BLACK, Legal Guardian of
Shianne Black,
Intervenor-Appellant/Cross-Appellee,

v.

FLORENCE, City of Florence,
Defendant-Appellee,
BOBBY JOE WINCE, in his official capacity
as an Officer of the Florence Police Department;
JOHN DOLAN, in his official capacity as an
Officer of the Florence Police Department;
THOMAS DUSING, in his official capacity as an
Officer of the Florence Police Department
Defendants-Appellees/Cross-Appellants,
RON KENNER, in his official capacity as
Boone County Sheriff,
Defendant.

No. 01-6205

SUSAN STEMLER,
Plaintiff-Appellee,
RANDY BLACK,
Intervenor-Appellee/Cross-Appellant,

v.

FLORENCE, City of Florence,
Defendant,
BOBBY JOE WINCE, in his official capacity
as an Officer of the Florence Police Department;

JOHN DOLAN, in his official capacity as an Officer of the Florence Police Department;

THOMAS DUSING, in his official capacity as an Officer of the Florence Police Department,
Defendants-Appellants/Cross-Appellees.

Before: BOGGS, Chief Judge; and SILER and GIBBONS, Circuit Judges.

JUDGMENT

(Filed Dec. 2, 2003)

On Appeal from the United States District Court for the Eastern District of Kentucky at Covington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the grant of summary judgment to the defendants on William Chipman's substantive due process claim in Case No. 01-5956 is REVERSED, and the denial of summary judgment with regard to Susan Stemler's equal protection claim in Case No. 01-6205 is REVERSED. IT IS FURTHER ORDERED that the denial of summary judgment with regard to Susan Stemler's excessive force and falsification of evidence claim is AFFIRMED, and both cases are REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CONSOLIDATED CIVIL ACTION NO. 94-62 & 95-14

WILLIAM CHIPMAN, Administrator of the Estate of Conni Black, ET AL **PLAINTIFFS**

VS.

CITY OF FLORENCE, ET AL **DEFENDANTS**

ORDER

(Filed June 29, 2001)

On Friday, June 22, 2001, oral arguments were heard on the defendants' renewed joint motion for summary judgment. Eric Deters and Pat Moeves represented the plaintiffs. Hugh Skees, Jeffrey C. Mando, Mary Ann Stewart, and Dave Whalin represented the defendants. The proceedings were recorded by official court reporter Amy J. Blosser.

The parties being thoroughly familiar with the facts, and background, the court will not reiterate them here.

Black's Estate's Claim

With regard to plaintiff William Chipman's substantive due process claim for the death of his decedent Connie [sic] Black, after a thorough analysis, the court concludes that the claim is barred by the principles of collateral estoppel (issue preclusion) in that the facts giving rise to the federal and state claims are identical. The issue of whether or not Black was in "custody" (that

is, her physical liberty restrained and/or her decision-making ability restrained and/or controlled by the defendant officers) *when she got in Kritis'* car is essential to the state wrongful death claim and the federal substantive due process claim.

This issue was fully litigated in the state courts and decided against Black's estate by the Supreme Court of Kentucky. Therefore, it cannot be relitigated here, even in a federal claim. "When such actions proceed simultaneously, as here, the first judgment entered must be regarded as *res judicata* for issues in the remaining case." *Lesher v. Lavrich*, 784 F.2d 193, 194-95 (6th Cir. 1986); *see also Gutierrez v. Lynch*, 826 F.2d 1534, 1537 (6th Cir. 1987) (*citing Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 556 (6th Cir. 1983) (the effect of the full faith and credit statute is to impose on federal courts "the obligation to give state court judgments the same effect as they have in the state in which they were rendered").[1]

"The Supreme Court [of the United States] has noted that *res judicata* 'promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system. Accordingly, the law is well-settled that federal courts must give prior state

[1] The court notes that when this matter was before the Sixth Circuit Court of Appeals on a motion to dismiss, it found that Black was in custody citing to both the allegations in the complaint as well as record evidence. However, in the state court decision, the custody issue was decided on a motion for summary judgment where, unlike the Sixth Circuit, no deference was given to the allegations as stated in the complaint and only the record evidence was relied upon.

court judgments the same preclusive effect they would have in the courts of that state." *Id.* (citations omitted); *see also* the *res judicata* analysis concerning Stemler's claims of the majority in the Sixth Circuit opinion this case, 126 F.3d at 871.

Black's estate argues that it is the "law of the case" that the Kentucky Supreme Court's holding that Black was not in custody at the time she entered Kritis' car is not binding on this court. (*See note 12 of the Sixth Circuit opinion*). However, the estate overlooks that the only state court ruling the Sixth Circuit had before it was the opinion and order of the Boone Circuit Court, which at page 4 found only that Black was not in custody "at the time [Kritis'] pickup struck the guardrail." The Supreme Court of Kentucky went further and found that Black was never in custody, 38 S.W.2d at 391. Thus, the holding of the Supreme Court of Kentucky is the first holding to make a determination solely on the record evidence that Black was never in police custody. Hence, this is entitled to preclusive effect by this court.

Furthermore, *res judicata* impedes Randy Black's intervening complaint on behalf of Shianne Black for loss of parental consortium. Absent a duty founded on custody, there can be no claim for loss of parental consortium in this matter.

Stemler's Claims

Plaintiff Susan Stemler's claims are more difficult. She asserts the following claims: 1) denial of equal protection based on selective prosecution; 2) falsification of evidence; and 3) excessive force.

Defendants argue that under the principles of claim preclusion Stemler has improperly split her claims, all of which should have been brought in one court or the other, since the state court had jurisdiction of the federal claims and vice versa. It should be noted that these claims were not actually litigated in the state court.

The court might well agree with defendants that Stemler could and should have brought these claims in state court, but failed to do so, and therefore, she should be precluded from proceeding with them after a final judgment has been rendered on her state court claims.[2] *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) (a state court judgment has the same claim preclusive effect in a federal § 1983 suit as it would be accorded in the state courts of the rendering state); RESTATEMENT (SECOND) OF JUDGMENTS §86 cmt. f (a plaintiff is ordinarily obligated to assert both of the federal and state claims in one action).

However, after a careful review of the Sixth Circuit opinion, this court has concluded that it was necessarily implied in that opinion that claim preclusion did not apply. Otherwise, the majority would not have addressed the principles of issue preclusion and held that they did not bar Stemler's claims listed above. The Sixth Circuit majority's holding[3] was that she cold proceed with these

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[2] One could hardly imagine a better illustration of the evils of claim splitting than the case at bar, which has become a procedural labyrinth due to the splitting of the federal and state claims.

[3] This court is of the view that the concurring opinion does not constitute the "law of the case" as claimed by defendants herein,

(Continued on following page)

claims, and this court is of the view that the doctrine known as "the law of the case" would be violated if it did not permit her to do so. "Under the 'mandate rule,' the district court must act, on remand, in accordance with the decision of a superior court:

> [T]he mandate rule . . . requires lower courts to adhere to the commands of a superior court. . . . Accordingly, [u]pon remand of the case for further proceedings after a decision by the appellate court, the trial court must 'proceed in accordance with the mandate and the law of the case as established on appeal.' The trial court must implement both the letter *and the spirit* of the mandate, taking into account the appellate court's opinion and the circumstances it embraces."

Allard Enterprises v. Advanced Programming Resources, 249 F.3d 564, 569-70 (6th Cir. 2001) (internal marks and citations omitted) (emphasis added).

This court finds that the "spirit of the mandate" directs it to allow Stemler to proceed with her claims.

Therefore, having heard counsel and the court being advised,

IT IS ORDERED as follows:

1) That defendants' summary judgment motion (**doc. #286 in #94-62 and Doc. #114 in #95-14**) be, and it is, hereby **granted in part** as to Chipman's claim for

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inasmuch as it was not necessary to make up a majority, two judges having concurred in the leading opinion.

substantive due process and the loss of parental consortium claim of the intervenor plaintiff, Randy Black. Both of these claims are hereby **dismissed with prejudice**.

2) That defendants' motion for summary judgment (**doc. # 286 in #94-62 and doc. #114 in #95-14**) be and is hereby by [sic] **denied in part** as to Stemler's claims.

3) That a jury trial on Stemler's claims will remain as previously set for **August 13, 2001 at 10:00 A.M.**

4) That a final pretrial conference will be held in this matter on **August 1, 2001 at 1:00 P.M.** A separate Final Pretrial Conference Order is filed concurrently herewith. Time limits for trial will be set at the final pretrial conference after conferring with counsel.

This 29th day of June, 2001.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 95-14

SUSAN STEMLER **PLAINTIFF**

VS.

CITY OF FLORENCE, ET AL **DEFENDANTS**

ORDER

(Filed Aug. 15, 2001)

On Wednesday, August 1, 2001, oral arguments were heard on all pending motions. Eric Deters represented the plaintiff. Hugh Skees, Jeffrey C. Mando, and Dave Whalin represented the defendants. The proceedings were recorded by court reporter LaCartha Pate. Having taken the matter under submission, and the court being duly advised,

IT IS ORDERED as follows:

Defendant Wince's motion for summary judgment on the claims of fabrication of evidence and excessive force based on the defense of qualified immunity (doc. #129-1) be, and it is hereby denied, the court having found that genuine issues of material fact exist on these claims, and that the claims are based on clearly established law.

On the fabrication of evidence claim, the court finds that if plaintiff's allegations are true, plaintiff's right to procedural and substantive due process were violated and that these rights were clearly established. The court further finds there is adequate evidence in the record to raise a genuine issue of material fact regarding these

claims. This evidence includes, but is not necessarily limited to, the fact that defendant Wince's handling of plaintiff's blood sample was highly unusual in failing to send it to the Kentucky State Police Laboratory for five days during which time no one can confirm the integrity of the sample. Further, a chain of custody cannot be established for the blood sample during this time. Also, plaintiff has an expert witness, Dr. Nelson, whose opinion is that if plaintiff's blood alcohol level at the scene was between .105 and .107 as tested by the Preliminary Breathalyser Test, her blood alcohol level could not have tested at .17 as the later analysis of the blood sample showed.

Having found sufficient evidence to defeat summary judgment on the issue of fabrication of evidence, the court finds that if the allegations are true, defendant Wince knew or should have known that tampering with evidence violates clearly established rights. Hence, defendant Wince is not entitled to qualified immunity on this issue.

On the excessive force claim, the court finds sufficient evidence to defeat summary judgment in that the jury could find plaintiff's constitutional rights under the 4th amendment have been violated by defendant Wince's actions in failing to follow the police department's policies on, handcuffing. This evidence, includes, but is not limited to, the fact that defendant Wince's counsel stipulated at oral argument that plaintiff was not a physical threat to defendant Wince. Further, it is undisputed that Wince knew that while plaintiff was handcuffed, she was hyperventilating because he took her to the hospital for this reason. Additionally, plaintiff offered evidence that the next day her wrists were bruised and scabbed over from the handcuffs.

The right to be free from excessive force is well established. The above evidence is sufficient for the jury to find that defendant Wince knew or should have known that the manner in which plaintiff was handcuffed was in violation of clearly established rights. The facts of this case do not present the scenario where the officer is faced with making a split-second decision and injury resulted as such. *See generally, Saucier v. Katz*, ___ S.Ct. ___, 2001 WL 672265 (June 18, 2001). Hence, the court finds defendant Wince is not entitled to summary judgment on his claim for qualified immunity on the excessive force claim.

Defendants' motion to alter or amend the Court's Order of June 29, 2001, (doc. #127-1) regarding claim preclusion on the fabrication of evidence and excessive force be, and it is hereby denied.

Defendants, however after the oral argument, filed a "Motion for Final and Appealable Order" (doc. # 147), to which plaintiff has no objections per the plaintiff's counsel. In said motion, defendants move this court to enter an order finding that the court's order of June 29, 2001 is final and appealable as to all claims regarding Susan Stemler. Specifically, defendants argued in their motion for summary judgment that Susan Stemler's three remaining claims (denial of equal protection based on selective prosecution; falsification of evidence; and excessive force) should have been dismissed due to the court's lack of subject matter jurisdiction under the Rooker-Feldman doctrine as to the denial of equal protection based on selective prosecution and that her claim for falsification of evidence and excessive force claims were barred under the doctrine of claim preclusion.

In its June 29, 2001 order, the court denied defendants' motion as to all of Susan Stemler's claims, but granted defendants' motion as the remaining claims in the consolidated action of Case #94-62 on the behalf of the Estate of Conni Black, *et al*, in which a notice of appeal was filed on July 18, 2001.

At the August 1, 2001 oral argument, the court indicated to the parties that it would deny defendant Wince's motion for qualified immunity, and defendants informed the court that they planned to take an interlocutory appeal. Since the companion case #94-62 is being appealed, coupled with the forthcoming interlocutory appeal of the court's decision on qualified immunity, defendants now request that the court designate all issues as final and appealable in the Susan Stemler case.

Defendants move this court for such an order arguing it has power to do so because Susan Stemler's issues are "inextricably intertwined" with the other matters over which the appellant court independently has jurisdiction. However, it is not for this court to make that determination. Instead, "[t]he doctrine of pendent appellate jurisdiction allows an appellate court, in its discretion, to exercise jurisdiction over issues that are not independently appealable when those issues are 'inextricably intertwined' with matters over which the appellate court properly and independently has jurisdiction." *Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793, 797 (6th Cir. 1998) (citations omitted) (emphasis added). Hence, this court lacks authority to do that which defendants ask and defendants' motion (doc. #147) is hereby denied.

Notwithstanding the foregoing, the court will state that in its view, the review of the foregoing issues by the Sixth Circuit would further sound judicial administration.

Regardless of the action taken by the Sixth Circuit on Susan Stemler's pendent claims, the defendants' having informed the court at oral argument that they intend to take an interlocutory appeal on the issue of qualified immunity on the claims of fabrication of evidence and excessive force, the court hereby stays this matter pending the appeal to the Sixth Circuit.

The court hereby **denies without prejudice** all pending motions in limine (**doc. #135-1, #137-1, #138-1**). The trial in the matter set for **August 13, 2001** is hereby cancelled. The parties shall submit a status report to the court within **ten** (10) **days** of the disposition of this matter in the Sixth Circuit.

Defendants' motion for leave to file an answer to plaintiff's second amended complaint (**doc. #130-1**) be, and it is hereby **granted**. The clerk shall file in the record defendants' tendered answer.

Plaintiff's motion to compel stipulations and meeting of the parties (**doc. #141-1**) be, and it is hereby **denied as moot**.

This 15th day of August, 2001.

/s/ William O. Bertelsman
WILLIAM O. BERTELSMAN,
JUDGE

Nos. 01-5956/6205

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN STEMLER, Plaintiff-Appellee, WILLIAM CHIPMAN, ADMINISTRATOR OF THE ESTATE OF CONNI BLACK, Plaintiff-Appellant/ Cross-Appellee, RANDY BLACK, LEGAL GUARDIAN OF SHIANNE BLACK, Intervenor-Appellant/ Cross-Appellee, v. FLORENCE, CITY OF FLORENCE, Defendant-Appellee, BOBBY JOE WINCE, IN HIS OFFICIAL CAPACITY AS AN OFFICE [sic] OF THE FLORENCE POLICE DEPARTMENT, ET AL., Defendants-Appellees/ Cross-Appellants, RON KENNER, IN HIS OFFICIAL CAPACITY AS BOONE COUNTY SHERIFF, Defendant.	ORDER (Filed Feb. 20, 2004)

BEFORE: BOGGS, Chief Judge;
SILER and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

38 S.W.3d 387

Supreme Court of Kentucky.
CITY OF **FLORENCE**, KENTUCKY; Bobby Jo Wince; John Dolan; and Thomas Dusing, Appellants,
v.
William **CHIPMAN**, Administrator for the Estate of Conni Black, Appellees.
No. 1999-SC-0158-DG.
Feb. 22, 2001.
As Amended Feb. 26, 2001.

Hugh Skees, Florence, *Dave Whalin*, Landrum & Shouse, *R. Thad Keal*, Landrum & Shouse, Louisville, Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, Covington, Counsel for Appellants.

Eric C. Deters, Eric C. Deters & Associates, Ft. Mitchell, *Richard G. Meyer*, Deters, Benzinger & LaVelle, PSC, Covington, Counsel for Appellees.

WINTERSHEIMER, Justice.

This appeal is from an opinion of the Court of Appeals which reversed and remanded a summary judgment in a wrongful death negligence claim against three Florence police officers and their employer, the City of Florence.

The threshold issue is whether the circuit judge properly granted summary judgment on the negligence claim against the officers. The questions presented are whether the decision of the Court of Appeals abrogates the special relationship doctrine based on the events of this case; whether the application of *Fryman v. Harrison,* Ky., 896 S.W.2d 908 (1995), was proper; whether there was a special relationship between the officers and Black creating a duty to protect her from harm; whether the actions of the officers became ministerial once they allegedly took

Black into custody; whether there is an immunity defense; whether there was a superseding or intervening cause for the death, and whether principles of official immunity under Kentucky law and qualified immunity under federal civil rights law were properly considered.

Conni Black, her boyfriend, Steve Kritis, and Susan Stemler were patrons at a Florence bar on February 19, 1994. The evidence indicates that Kritis assaulted Black and she subsequently left with Stemler whom she had met that night while line dancing at the bar. Kritis followed the Stemler car and chased it through residential streets in the early morning hours. Ultimately the vehicles reached an intersection and were confronted by police.

Wince, a Florence police officer, joined other police at the scene and was assigned the task of handling Stemler who was tested for alcohol and arrested for DUI. Another officer, Boone County Deputy Sheriff Reuthe, initially determined that Kritis was not intoxicated although there was a smell of some substance at the scene. Deposition testimony by Reuthe indicated that he was familiar with DUI testing and that he had received commendations within his department in the previous four years for the most DUI arrests, and had taught at numerous seminars on DUI detection and investigation. He testified that he had conducted a type of sobriety test on Kritis while the subject remained in his pickup truck. The deputy said he observed Kritis for signs of intoxication such as nervousness, slurred speech, poor hand and eye coordination, failure with short term memory and inability to process information. He stated that Kritis responded without hesitation or difficulty to his questions and that he then determined upon observation that the demeanor, appearance and responsiveness of Kritis indicated that he was

not intoxicated so as to require additional sobriety testing. Ruethe stated that he had no reasonable articulable suspicion to remove Kritis from the vehicle. Reuthe also reported to Florence Police Lieutenant Dusing that Kristis told him that Stemler was a lesbian and had kidnapped his girlfriend.

Barker, an eye witness who had followed the chase, told the officers that Stemler was the wrong person to arrest and that Kritis was crazy. Barker would later characterize the officers as arrogant because they apparently dismissed his account and told him to leave the scene.

Black, who appeared to be drunk, remained seated in the Stemler automobile. Outside of her presence, Lieutenant Dusing directed Officer Dolan to arrest her for public intoxication unless she decided to leave with Kritis. A careful review of the record indicates that no threat of arrest was ever communicated to Black by the police if she refused to accompany Kritis. The officers escorted her from the Stemler automobile when she told the police that she wanted to "go with the guy in the truck." Although she appeared to be intoxicated, Officer Dolan determined that she was competent enough to make the decision to leave with Kritis. When Black was unable to unfasten her seatbelt in the Stemler automobile because it had become jammed at the latch, Deputy Alsip helped her unfasten it. Alsip testified that Black "stepped out of the car." An exhaustive study of the extensive record in this case indicates that Black, without physical assistance from anyone, walked to Kritis' truck and entered it while the Boone County deputy held the door open for her. Even Barker admits in his deposition testimony in three separate places

that Black went willingly and unassisted to the Kritis truck.

Kritis testified that as they drove away, Black started an argument with him, hit him in the head with a drywall tool she found on the front seat and then grabbed the steering wheel causing him to lose control of the truck and strike a guardrail. Black was partially ejected from the truck and suffered a fatal injury. Erlanger police responded to the accident scene, and they arrested Kritis who was later determined to be legally intoxicated at the time of the accident with a blood alcohol level of .115 as a result of a blood test. Kritis testified that he was driving at 65 miles per hour when the accident occurred.

Chipman, as Black's Administrator, filed both a federal civil rights claim and a state court negligence action against the city and various police officers involved in the initial stop of the Stemler and Kritis vehicles. Summary judgment was granted by the federal district court but was reversed by the Sixth Circuit Court of Appeals. Similarly, in the state claim, the circuit judge granted summary judgment which was then reversed by the Court of Appeals. The United States District Court placed the federal action in abeyance because of the pending jurisdiction of this Court. We accepted discretionary review.

I. *Special Relationship*

a. Summary Judgment Review

The summary judgment procedure authorized by CR 56.01 et seq., is intended to expedite the disposition of cases, and if the grounds provided by the rule are established, it is the responsibility of the trial court to render an

appropriate judgment. The grounds for such a judgment are: 1) there is no genuine issue as to any material fact, and 2) the moving party is entitled to a judgment as a matter of law. As originally noted in *Paintsville Hospital Co. v. Rose,* Ky., 683 S.W.2d 255 (1985), and later in *Steelvest, Inc. v. Scansteel Service Center, Inc.,* Ky., 807 S.W.2d 476 (1991), as well as *James Graham Brown Foundation, Inc. v. St. Paul Fire and Marine Insurance Co.,* Ky., 814 S.W.2d 273 (1991), the summary judgment procedure is not a substitute for trial.

The circuit judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy, and it is established that the adverse party cannot prevail under any circumstances. *Steelvest, supra,* originally stated that the test would include the phrase "impossible" for the nonmoving party to prevail at trial. Later, this Court clarified that the word "impossible" is used in the practical sense, not the absolute sense. *Perkins v. Hausladen,* Ky., 828 S.W.2d 652 (1992). The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial. It bears repeating that this Court stated in *Hoke v. Cullinan,* Ky., 914 S.W.2d 335 (1995), that:

> contrary to the view of some, our decision in *Steelvest* . . . does not preclude summary judgment. Provided litigants are given an opportunity to present evidence which reveals the existence

> of disputed material facts and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate.

The approach to summary judgments in the state court is different from that in the federal court. The Court of Appeals in its opinion said that its recitation of the events relevant to these appeals draws heavily upon the Sixth Circuit opinion of Judge Boggs in *Stemler v. City of Florence,* 126 F.3d 856 (6th Cir.1997). That appeal was before the Sixth Circuit Court of Appeals pursuant to F.R.C.P. 12(b)(6). The description of the situation in the federal court opinion was based on the allegations contained in the original federal complaint. The focus of the *Stemler* federal appeal was in regard to the sufficiency of the pleadings to state a cause of action for constitutional harm because it was based on the federal civil rights action. There is a significant difference between the standards used in determining a federal rule 12(b)(6) matter, and a summary judgment in state court. *See CSX Transp., Inc. v. Marquar,* 980 F.2d 359 (6th Cir.1992). We are not persuaded by citation to the record of the federal appellate court in considering our review of the Kentucky Court of Appeals decision. The facts or events recited in the Stemler case in federal court and so completely relied on by our Court of Appeals are totaly unsupported by the record in this case and contradictory to the sworn testimony of all the witnesses in this case. The statements about custody are not supported by our review and analysis of the deposition testimony in the record.

In this proceeding, the summary judgment was based on a fully developed record, including extensive deposition testimony of all the witnesses who were involved in the events described in the Kentucky action. The Kentucky

Court of Appeals misconstrued the events as recited in the federal Court of Appeals decision. This is of critical importance in determining whether a special relationship existed between Black and the three police officers. As noted by the circuit judge, there are numerous disputes with respect to ancillary facts but there exists no genuine issue with respect to the facts material to the legal principles supporting the summary judgment which was granted. The facts relied upon by this Court are those found in the deposition testimony in this record and used by the circuit judge in his determination of summary judgment.

There is no evidence in the deposition testimony that Black was lifted or placed in the Kritis truck. She was not in custody or otherwise restrained as a result of the conduct of the police officers.

We are persuaded by the analysis found in *City of Sunnyvale v. Superior Court of Santa Clara County,* 203 Cal.App.3d 839, 250 Cal.Rptr. 214 (1988), which held that police officers who had stopped an automobile for an alcohol related traffic matter were not liable in tort when they allowed the occupants to proceed. The California court stated that there is no duty to control the conduct of another or to warn those endangered by such conduct in the absence of a special relationship. Mere presence in a stopped vehicle does not establish any protective duty toward a passenger to be imposed on the officer. Similarly, in *Jackson v. Clements,* 146 Cal.App.3d 983, 194 Cal.Rptr. 553 (1983), the fact that the officers undertook to investigate and observed the intoxicated condition of some, did not create a special relationship which imposes on the officers a duty to control the citizen's subsequent behavior. *See Hernandez v. City of San Jose,* 14 Cal.App.4th 129, 17

Cal.Rptr.2d 589 (1993). *See also Jones v. Maryland National Capital Park and Planning Com'n,* 82 Md.App. 314, 571 A.2d 859 (1990), in which the Maryland court held that there was no special relationship so as to create a duty on the part of an officer to protect third parties arising out of either an investigatory traffic stop, or its resulting brief detention.

The mere fact that the police told Black to remain in the Stemler automobile while the police were taking control of the investigation scene does not rise to the level of custody or "being otherwise restrained." A brief detention at a traffic stop does not create the relationship of custody. *See City of Sunnyvale, supra.*

Although there may be a vigorous argument regarding the description of the events, it does not alter the testimony found in the depositions. The circuit judge correctly considered that testimony and on review, we find that he was correct in determining that there was no genuine issue as to any material fact and that the movant was entitled to a judgment as a matter of law. CR 56.03. It is unfortunate that the description of the events in the federal complaint is at variance with the sworn deposition testimony in the record. The unquestioning and uncritical adoption by the Kentucky Court of Appeals of the description of such events in the complaint was unfortunate and in error.

Our review of the lengthy record in this case causes us to conclude that the Court of Appeals was in error when it determined that Black was in custody and that the officers had a duty to protect her from third-party harm. The facts as considered by the circuit judge in granting summary

judgment are that Black remained in the Stemler automobile during the traffic investigation stop and that she asked to leave the scene with Kritis. She also walked on her own to the Kritis truck despite being intoxicated. She was not physically placed in the vehicle by any of the police officers and she was not given a threat by any of the officers either to leave with Kritis or face arrest. The consequence is that Black was never in custody or otherwise restrained so as to give rise to a special relationship between the police officers and Black. There is no evidence in the record from which it can be concluded that Black was in custody by the police or any state actor at the time the pickup truck struck the guardrail. Kritis testified by deposition that within minutes of leaving the police stop, "Black woke up and went haywire." He states that she began hitting him which led to his hitting her in return and losing control of the truck. The truck swerved to the right and collided with a guardrail. The impact threw Black partially out of the passenger side window and her head and an arm were completely severed from her body. Erlanger police charged Kritis with manslaughter and he eventually pled guilty to reckless homicide.

In order for a claim to be actionable in negligence, there must be the existence of a duty and unless a special relationship was present, there is no duty owing from any of the police officers to Black to protect her from crime or accident. In order for the special relationship to exist, two conditions are required: 1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and 2) the violence or other offensive conduct must have been committed by a state actor. *Cf. Fryman v. Harrison, supra; Ashby v. City of Louisville,* Ky.App., 841 S.W.2d 184 (1992). Neither of

these factors can be found from the undisputed material facts in this case. There is no evidence from which it can be ascertained that Black was in state custody or otherwise restrained by the police at the time the pickup truck struck the guardrail with the fatal result. In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers.

II. *Court of Appeals Legal Determination*

The Court of Appeals erred in its determination that there was a special relationship between the police officers and Black which created a duty to protect her from harm. The circuit court correctly determined that there was no evidence of custody or other restraint at the time of the accident which was perpetrated by a state actor. Black was unable to establish the elements of a special relationship pursuant to *Fryman,* and thus her claims that the officers breached a duty to protect her fails as a matter of law.

It is a question of law whether Black was in custody so as to establish a special relationship. The record indicates that the police officers did not exercise sufficient control over Black to establish that she was in custody. The fact that she was a passenger in a motor vehicle stopped in a police investigation did not establish custody. The evidence indicates that the officers did not make any threat of arrest to Black or in any way attempt to coerce her decision as to how she would leave the scene of the traffic investigation. Black repeatedly requested that she be allowed to leave the scene with Kritis, her boyfriend. She walked unassisted to the Kritis truck and thanked an

officer for his courtesy in holding the door for her. The officers did not make any representations concerning whether or not she should leave with Kritis, nor did they indicate that they would protect or assist her in her decision in any way. The officers did not voluntarily assume any duty to protect Black.

We agree with the officers that imposing a duty in this case in the absence of a special relationship as required by *Fryman* would be tantamount to establishing a universal duty of care on the police to prevent any third party harm to each and every citizen with whom they have contact regardless of how slight the interaction or brief the duration. As argued by the officers, the result would be exactly what the Court of Appeals suggested which would be to avoid potential liability, officers will simply drive past situations they encounter instead of stopping or investigating. Such a result is not in the public interest and is not required by the law.

We are persuaded by the analysis provided by *Ezell v. Cockrell,* 902 S.W.2d 394 (Tenn.1995), which indicates that persons who serve the public must be allowed to carry out their function without fear of having to answer for harm caused to an individual by events which are outside the control of the public official. Public officials are not an insurer of the safety of every member of the public, nor are they personally accountable in monetary damages only because the individual is a public official charged with a general duty of protecting the public.

The imposition of a universal duty of care severely reduces the ability of those public officials to engage in any discretionary decision-making on the spot. There is a danger of substituting the legal concept of "foreseeability" for "custody" as the threshold in establishing a special

relationship. *Cf. Holson v. State,* 99 Md.App. 411, 637 A.2d 871 (1994). In that case it was held that an officer did not owe a duty to protect an inebriated passenger following the arrest of the driver of a vehicle for alcohol related driving. The inebriated passenger was left at the scene of the traffic stop and apparently walked into the path of a vehicle and was struck. The Court held that "being intoxicated . . . does not create a special relationship."

The Kentucky Court of Appeals incorrectly analyzed the situation when it stated that a degree of discretion became ministerial once Black was in custody. Our examination of the record indicates that the circuit judge was correct in determining that Black was never in custody. The observation by the Court of Appeals that "had the officers simply driven past the scene and refused to stop, there would not have been a restraint on Black's freedom" is difficult to reconcile with any concept of public reliance on police and other public officials to assist or at least investigate during a time of difficulty. The reliance by the Court of Appeals on foreseeability only to create a duty essentially deprives all public officials, including police, of the ability to make an honest mistake of judgment. We must reject the attempt by the Kentucky Court of Appeals to establish a universal duty of care for all public officials.

The better standard is the one enunciated in *Fryman* that before addressing foreseeability a court must first determine that there is a duty owed by public officials. Foreseeability does not create a duty. Rather, duty can only be created by showing the existence of a special relationship between the individual and the public official.

As noted earlier, *Fryman* and *Ashby, supra,* require that the victim be in custody and that the violence or other

offensive conduct be perpetrated by a state actor. Foreseeability of harm arises only after the establishment of the existence of a duty.

III. *Superseding or Intervening Cause*

Even if custody were established in this case, the fighting between Kritis and Black while driving on I-75 which resulted in the car crashing into the guardrail with fatal consequences for Black was outside the control of the police officers who made the earlier stop. In *Fryman,* this Court reinforced the concept that a superseding cause will, as a matter of law, destroy the connection between the indirect harm to an individual and the alleged omissions of a public official. "The question of whether an undisputed act or circumstance is a superseding cause is a legal issue for the court to resolve and not a factual matter for the jury." *Fryman,* at 911. It is clear from the record that there existed a superseding intervening cause which was wholly outside the control of the police officers.

In light of our determination that custody was not established in this case we need not decide whether the officers were entitled to official immunity.

The decision of the Court of Appeals is reversed, and the summary judgment of the Boone Circuit Court is reinstated.

LAMBERT, C.J., *COOPER*, *GRAVES*, *JOHNSTONE*, *KELLER* and *WINTERSHEIMER*, JJ., concur.

STUMBO, J., dissents from the grant of summary judgment.

(2)

Supreme Court, U.S.
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No. 03-1574

In The Supreme Court of the United States

BOBBY JOE WINCE, in his individual capacity;
JOHN DOLAN, in his individual capacity; and
THOMAS DUSING, in his individual capacity,

Petitioners,

v.

SUSAN STEMLER, WILLIAM CHIPMAN,
Administrator of the Estate of CONNI BLACK, and
RANDY BLACK, Legal Guardian of Shianne Black,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Application of the *Rooker-Feldman* Doctrine

In order to determine the applicability of the *Rooker-Feldman* doctrine to the substantive due process claim of Plaintiff-Respondent Chipman, the Court must differentiate between the two factual scenarios which informed the respective federal and state court decisions at issue. The first scenario occurred when the Petitioner police officers forced the decedent, Conni Black, into the vehicle of an obviously drunk driver, known by the police to have just previously assaulted and terrorized Black and her companion, Susan Stemler. This is the "police stop" scenario which led the Sixth Circuit to acknowledge the validity of Respondent's substantive due process claim. The second scenario occurred some short time thereafter when the vehicle into which Black had been forced by threat of arrest collided with a guardrail along the interstate highway. Because Black sustained fatal injuries in this collision, it gave rise to Respondent's state law wrongful death claim.

The Kentucky Supreme Court affirmed the summary judgment dismissal of this claim on the sole basis that decedent was not in police custody *at the time of the fatal accident*. The question, then, is whether the Sixth Circuit properly declined to apply the *Rooker-Feldman* doctrine by finding that the state wrongful death claim (with its necessary focus on the immediate cause of the collision) is not "inextricably intertwined" with the Respondent's substantive due process claim (with its necessary focus on the issue of police custody during the investigative traffic stop).

QUESTIONS PRESENTED FOR REVIEW – Continued

2. The Application of Claim Preclusion

Plaintiff-Respondent Chipman filed parallel simultaneous suits in state and federal court asserting, in the respective courts, a wrongful death claim and a substantive due process claim under 42 U.S.C. § 1983. Plaintiff-Respondent Stemler filed her two surviving claims, excessive force and fabrication of evidence, in federal court only. The issue for Chipman's and Stemler's federal claims is whether Kentucky's transactional rule for claim-splitting is applicable or not and, if it is not applicable, whether the Sixth Circuit correctly concluded that the appropriate inquiry under the Kentucky law of claim preclusion is the identity or lack of identity of the state and federal causes of action.

Application of both doctrines, *Rooker-Feldman* and Claim Preclusion, involves a fairly detailed examination of the underlying facts, as well as the complex procedural history of this litigation. Though essential to a proper application of these doctrines, no such examination appears in the Petition. Such a review follows.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPPOSITION TO PETITON FOR WRIT OF CERTIORARI	1
STATEMENT OF THE CASE	1
A. STATEMENT OF MATERIAL FACTS	1
1. The Police Stop	2
2. The Fatal Accident	3
3. Stemler's Prosecution	4
B. PROCEEDINGS BELOW	5
1. State Court Proceedings	5
a. Chipman's Claims	5
b. Stemler's Claims	6
2. Federal Court Procedings	7
a. Chipman's Claims	7
b. Stemler's Claims	8
RESPONDENTS' ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	10
I. SINCE THE SIXTH CIRCUIT'S OPINION DID NOT IN EFFECT OVERRULE THE STATE COURT'S OPINION, THE *ROOKER-FELDMAN* DOCTRINE IS INAPPLICABLE TO THIS CASE	10

TABLE OF CONTENTS – Continued

Page

II. SINCE NEITHER A BROAD NOR A NARROW INTERPRETATION OF THE *ROOKER-FELDMAN* DOCTRINE IS APPLICABLE TO THIS CASE, IT IS UNSUITABLE FOR CLARIFYING THAT DOCTRINE 13

III. PRIOR CASE LAW FROM THIS COURT PLAINLY PERMITTED RESPONDENTS TO FILE SIMULTANEOUS PARALLEL CLAIMS IN STATE AND FEDERAL COURT 16

IV. THE SIXTH CIRCUIT CORRECTLY APPLIED KENTUCKY LAW IN REJECTING PETITIONERS' CLAIM PRECLUSION ARGUMENT 18

A. The Transactional Rule is Inapplicable As Respondents Have Not Split Their Causes Of Action 19

B. The Transactional Rule Does Not Bar Respondents' Claims 24

C. Respondents' Federal And State Causes Of Action Are Not "The Same" For Purposes Of Claim Preclusion 28

CONCLUSION 29

APPENDIX

Stemler v. City of Florence, 126 F.3d 856 (CA6 1997) .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Arnold v. K-Mart Corporation, 747 S.W.2d 130 (Ky. App. 1988) 22

Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 16, 17

Centifanti v. Nix, 865 F.2d 1422 (CA3 1989) 14

Chipman v. City of Florence, 858 F. Supp. 87 (E.D. Ky. 1994) 7

Chipman v. City of Florence, No. 1996-CA-001287-MR (Ky.Ct.App. Nov. 25, 1998) 6

Chipman v. City of Florence, No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996) 6

City of Florence v. Chipman, 38 S.W.2d 387 (Ky. 2001) 6

Colorado River Water Conservation District No. 7 v. United States, 424 U.S. 800 (1976) 17

Dennis v. Fiscal Court of Bullitt County, 784 S.W.2d 608 (Ky. App. 1990) 19, 20, 21

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 10

Egbert v. Curtis, 695 S.W.2d 123 (Ky. App. 1985) 21, 22

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 17

Harris v. Ashley, 165 F.3d 27 (CA6 1998) ...19, 20, 21, 24, 26

Hays v. Sturgill, 193 S.W.2d 648 (Ky. 1946) 26, 27

Holloway v. Brush, 220 F.3d 767 (CA6 2000) 12

Kirchner v. Riherd, 702 S.W.2d 33 (Ky. 1985) 21, 22

TABLE OF AUTHORITIES – Continued

Page

Kougasian v. TMSL, Inc., 359 F.3d 1136 (CA9 2004)... 15, 16

Moccio v. N.Y. State Office of Ct. Adm., 95 F.3d 195 (CA2 1996) 14, 15

Newman v. Newman, 451 S.W.2d 417 (Ky. 1978) 29

Pennzoil Company v. Texaco, Inc., 481 U.S. 1 (1987) 11, 12, 13

Peterson Novelties, Inc. v. City of Berkley, 305 F.3d 386 (CA6 2002) 11, 12

Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939) 17

Razatos v. Colorado Supreme Court, 746 F.2d 1429 (CA10 1984) 14

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)..... 10, 12

Smith v. Bob Smith Chevrolet, Inc., 275 F. Supp. 2d 808 (W.D. Ky. 2003) 26, 27

Stemler v. City of Florence, 126 F.3d 856 (CA6 1997) ..... *passim*

Stemler v. City of Florence, 350 F.3d 578 (CA6 2003) ..... *passim*

Stemler v. Florence, No. 94-CI-00459..... 6

Stern v. Nix, 840 F.2d 208 (CA3 1988) 14

Watts v. K, S & H, 957 S.W.2d 233 (Ky. 1997) 18, 25, 27

Whittaker v. Cecil, 69 S.W.3d 69 (Ky. 2002)..... 29

Wicker v. Board of Education of Knott County, 826 F.2d 442 (CA6 1987) 18

Yeoman v. Kentucky Health Policy Board, 983 S.W.2d 459 (Ky. 1998)..... 9, 19, 28, 29

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1331 18

42 U.S.C. § 1983 ..... *passim*

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) 20, 21, 22, 23

RESTATEMENT (SECOND) OF JUDGMENTS § 25(e) (1982) 23

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Susan Stemler, William Chipman as Administrator of the Estate of Conni Black, and Randy Black as Legal Guardian of Shianne Black oppose the Petition for a Writ of Certiorari filed by Bobby Joe Wince, Thomas Dusing and John Dolan on the basis that Petitioners primarily seek to clarify a procedural/jurisdictional rule, the *Rooker-Feldman* doctrine, which is wholly foreign to the dispositive issues of this case. Likewise, Petitioners' assertion that the Sixth Circuit misapplied the Kentucky law of claim preclusion by not applying the transactional rule cannot withstand a careful review of that settled case law. Nevertheless, when applying the transactional rule (for the sake of argument only) or when applying the applicable claim preclusion standard, Respondents' substantive due process, excessive force and fabrication of evidence claims are not barred by res judicata.

STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

The following recitation of facts borrows heavily from the Sixth Circuit's statement of facts in *Stemler v. City of Florence*, 126 F.3d 856 (CA6 1997). A copy of that opinion is attached hereto as Appendix 1. The Sixth Circuit, understandably appalled at Petitioners' conduct leading to the death of Respondent Chipman's daughter, Conni Black, offered this terse summary of the facts:

> The very notion that police officers should not have known that they could not [at the time of the police stop] force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society.

Id. at 870.

On February 18, 1994, Conni Black and her former boyfriend, Steve Kritis, had been drinking excessively at a local bar. An altercation arose between Black and Kritis during which Kritis forcefully struck Black a number of times and then later struck Black's friend, Susan Stemler. In the circumstances, Black asked Stemler to drive her home. Kritis immediately pursued the two women in his truck with his headlights kept off and at one point in the pursuit rear-ended Stemler's car in an attempt to make her stop.[1]

A witness to the chase (Terry Barker) observed that the women were in obvious distress. He reported that Kritis, at a high rate of speed, pulled ahead of Stemler's car, forcing her down a residential cul-de-sac. When Stemler pulled her car into a driveway, Kritis pulled behind to block her in. At this time, a retired police officer (William Minnick) was awakened by the noise. He then saw Kritis standing in his driveway on the passenger (Conni Black's) side of the car hitting the car window and yelling. Stemler then maneuvered around Kritis' truck and drove up the street, but Kritis jumped in his truck and again gave chase. According to Barker, Kritis was driving about 60 miles per hour on the sidewalk of the residential street. After calling 911, Minnick got in his car and followed Kritis and Stemler to the main highway at the top of his street.

1. The Police Stop

After the vehicles pulled back onto the main street, they stopped at a red light. At this time, Barker flashed his lights to alert a nearby police officer, Defendant-Petitioner Thomas Dusing, who was responding to the 911 call. When Dusing pulled up to Barker, Barker informed

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[1] These facts are being culled from the Sixth Circuit's recitation of the deposition testimony of various witnesses as reported in the opinion at 126 F.3d 856. (Appendix 1)

him that there was a "serious problem" with the two vehicles ahead of him and that Kritis appeared to be a threat to the safety of the two women. Dusing then pulled his cruiser in front of Stemler's car and Kritis' truck. Stemler told Dusing that Kritis was drunk, that he had assaulted both her and Black, that he had threatened to kill her, and that he had placed both of them in danger by chasing after them at high speed.

Another police officer approached Kritis, who told the officer that Stemler was a lesbian who was kidnapping his girlfriend. Witnesses say that the officers and deputies at the scene repeated to each other and to others present Kritis' assertion that Stemler was a lesbian. Kritis was never tested for intoxication or even asked to step out of the truck, even though Dusing was told by another police officer that Kritis smelled of alcohol. Subsequent observers would also testify that, shortly after the police stop, it was unmistakably apparent that Kritis was very drunk.

Dusing ordered an officer to approach Black, who was still in the passenger seat of Stemler's car, to advise her that she would be arrested for public intoxication "if she didn't want to leave with the male." Two officers then lifted her out of the car and walked her back to Kritis' truck, with Black stumbling as she made her way. One officer then physically placed her into the passenger seat of the truck.

2. The Fatal Accident

As soon as Black was in the truck, Kritis drove away. By Kritis' account, Black passed out, but then woke up and began to hit him. While striking her back, Kritis lost control of the truck, which swerved and collided into the guardrail. Black was partially ejected from the passenger-side window. Her arm was severed from her body and the top of her skull was severed off by the guardrail, but Kritis continued driving for several miles before stopping. Black died immediately upon impact with the guardrail.

Police officers not involved in the earlier police stop arrived at the location where Kritis had stopped (responding to a 911 call by an individual on the scene). It was so apparent to these officers that Kritis was drunk that they did not even need to conduct a field sobriety test to determine that there was probable cause to arrest Kritis for driving under the influence.

Based upon these facts, the Sixth Circuit in *Stemler* concluded that witness testimony clearly supported a claim that the police officers acted at the police stop with deliberate indifference to the threat of injury to Black:

> [The officers] knew, or reasonably should have known, that Kritis was unfit to drive. They knew, or reasonably should have known, that Kritis had assaulted [Black] earlier in the evening and had threatened to hurt her. Nevertheless, they chose to act affirmatively to place her in harm's way.

126 F.3d at 870.

3. Stemler's Prosecution

After arresting Stemler, Officer Wince took her for a blood test.[2] Stemler related that she had drunk a half-glass of beer and two Irish coffees over the course of the night. She concluded that the officers must have tampered with her blood sample, which allegedly revealed a .17 blood alcohol level an hour after a breathalyzer test supposedly registered a .105 blood alcohol level. Wince handled her blood sample after he learned that Black had died. A forensic scientist reviewed the specimens and the timing of the tests and concluded that the sample's integrity had been destroyed, given that Wince waited five days to deliver the sample and that there were no procedures to

[2] As with the above facts, the Stemler prosecution facts are being taken from the Sixth Circuit's recitation of the deposition testimony as reported in the opinion at 126 F.3d 856. (Appendix 1)

guard against tampering. When a blood sample is submitted to the detective's office of the Florence Police Department, the clerk of that office is supposed to receive a property card and an evidence tag; the clerk never received either in this case in violation of department policy. Stemler's sample was the only sample that Wince had ever kept in the Florence Police Department refrigerator for five days in his career and was also the only sample that he had ever personally driven to the lab. According to Officer Chester Snow, who supervised the property room, it was "highly irregular" to keep a sample in the refrigerator for five days.

Stemler was prosecuted in the Boone County District Court for drunken driving. She defended the charge on the ground that the evidence against her had been fabricated. Dr. Gordon James testified at her trial that the handling of the blood sample was "arbitrary" and that the chain of custody had not been established. After her first trial resulted in a hung jury, Boone County prosecutors determined to retry her. Although Wince claimed at Stemler's first DUI trial that he had not completed an evidence card, at the retrial he produced a completed card which neither the Florence Police Department clerk nor Snow had ever seen. He claimed that he had completed the card on February 9, at the time of the arrest; but the clerk testified that if that were true, she should have seen the card. The second jury acquitted Stemler. As stated above, although Stemler was twice tried for DUI and acquitted, Petitioners did not even conduct a field sobriety test on Kritis.

B. PROCEEDINGS BELOW

1. State Court Proceedings

a. Chipman's Claims

On March 7, 1994, William Chipman, the administrator of the estate of Conni Black, filed a wrongful death action in the Boone Circuit Court against Florence police

officers, Boone County deputies, the City of Florence and the Boone County Sheriff. The Boone Circuit Court entered summary judgment on behalf of the defendants on Chipman's wrongful death claim. *Chipman v. City of Florence*, No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct Apr. 2, 1996). The Kentucky Court of Appeals reversed the Boone Circuit Court. *Chipman v. City of Florence*, No. 1996-CA-001287-MR (Ky.Ct.App. Nov. 25, 1998). The Kentucky Supreme Court reversed and reinstated the summary judgment in favor of defendants. *City of Florence v. Chipman*, 38 S.W.3d 387 (Ky. 2001).

The Kentucky Supreme Court reasoned that there was no "special relationship" between Black and the officers, **when the pickup truck struck the guardrail**, to support a wrongful death claim. *Id.* at 392. The Court determined that no "special relationship" existed because Black was not in custody "at the time the injury producing act occurred," which the Kentucky Supreme Court held to be the time the truck struck the guardrail. *Id.* More specifically, the Court held:

> There is no evidence from which it can be ascertained that Black was in state custody or otherwise restrained by the police at the time the pickup truck struck the guardrail with the fatal result. In addition, there is no evidence to support a claim that the conduct which caused the pickup truck to leave the roadway and strike the guardrail was the result of the actions of the police officers.

Id. at 392. The Kentucky Supreme Court's decision was rooted in the absence of a special relationship **at the time the truck struck the guardrail**.

b. Stemler's Claims

Susan Stemler brought claims of malicious prosecution, false arrest, abuse of process, assault and battery, false imprisonment and negligent or intentional infliction of emotional distress. *Stemler v. Florence,* Boone Circuit

Court, No. 94-CI-00459. The state trial court granted summary judgment in favor of the defendants on all claims except Stemler's assault and battery claim against Wince, which Stemler voluntarily dismissed so that an appeal could proceed. The Kentucky Court of Appeals affirmed the decision of the trial court. Stemler did not seek further appeal in state court on these claims.

2. Federal Court Proceedings

a. Chipman's Claims

On March 31, 1994, three weeks after filing the wrongful death action in state court, Chipman also filed a complaint in federal court against the same defendants. The complaint alleged that the defendants were liable under 42 U.S.C. § 1983 because they had displayed deliberate indifference to the welfare of Conni Black by failing to arrest Kritis and putting Black into his truck. The district court granted the officers' motions to dismiss under Rule 12(b)(6) of the FRCP on the grounds of qualified immunity. The district court also granted the motions for summary judgment of Florence and Boone County. *Chipman v. City of Florence*, 858 F. Supp. 87 (E.D. Ky. 1994), reconsideration denied on amended complaint, 866 F. Supp. 332 (E.D. Ky. 1994).

On October 8, 1997, the Sixth Circuit upheld the district court's order granting summary judgment to the governmental defendants, Florence and Boone County. *Stemler*, 126 F.3d at 866. (*See* Appendix 1). However, the Sixth Circuit reversed the district court's dismissal of the claims against the individual officers, holding that there were sufficient grounds to maintain a § 1983 claim against the individual officers. *Id.* at 870. The only state court decision prior to the Sixth Circuit's decision was the state trial court's decision awarding summary judgment to the defendant officers on the basis that Black was not in custody when the pickup struck the guardrail and that the conduct of the state actors was not the direct cause of the

fatal accident (the same rationale subsequently adopted by the state Supreme Court). The Sixth Circuit noted the state trial court's opinion and commented that "[w]hile these findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim." *Stemler*, 126 F.3d at 870, n.12. The Sixth Circuit remanded the case to the district court for further proceedings.

On remand, the district court held the case in abeyance pending a decision by the Kentucky Supreme Court on the appeal from the Boone Circuit Court's entry of summary judgment in favor of defendants and the Kentucky Court of Appeals' reversal of that order, issued February 22, 2001. Chipman later reached a settlement with the Boone County officers. In June 2001, the federal district court granted the officers' motion for summary judgment on Chipman's substantive due process claim. Relying on the doctrine of issue preclusion (and ignoring the Sixth Circuit's fn.12 cited above), the district court concluded that the Kentucky Supreme Court's decision foreclosed Chipman's substantive due process claim.

The Sixth Circuit reversed, holding that a § 1983 claim requires a showing that the state actors and the plaintiff had a sufficiently direct relationship such that the state actors owed Conni Black a duty not to subject her to probable harm. *Stemler v. City of Florence*, 350 F.3d 578, 586 (CA6 2003). The relevant issue was whether Black was in custody during the police stop. The Sixth Circuit held that the two distinct federal and state causes of action and the separate factual issues related to those diverse claims were sufficiently distinguishable to preclude the application of both res judicata and the *Rooker-Feldman* doctrine. *Id.* at 588-89.

b. Stemler's Claims

Stemler filed a § 1983 action against the officers and the City of Florence. The district court granted the officers' Rule 12(b)(6) motions to dismiss on the basis of qualified

immunity. The district court then consolidated her remaining case with Chipman's and awarded summary judgment to Florence. A voluntary dismissal was entered pursuant to an agreement between the parties to dismiss the claim so that an appeal could proceed. The agreement allowed her to bring her claim again should she be successful upon appeal. The Sixth Circuit affirmed the grant of summary judgment in favor of the City of Florence. *Stemler*, 126 F.3d at 866.

Stemler amended her complaint to allege that an officer fabricated blood sample evidence used in her DUI trials and reasserted her excessive force claim. The district court held the case in abeyance pending final judgments in the state court proceedings. The district court denied the officers' motion for summary judgment. In its more recent opinion, the Sixth Circuit reversed the denial of summary judgment on Stemler's equal protection claim (barred by issue preclusion), but affirmed the denial of summary judgment on her excessive force claim and fabrication of evidence claim, her two sole surviving claims. The Sixth Circuit held as follows:

> Wince also argues that claim preclusion would bar Stemler from bringing these claims in federal court, because as [sic] she could have brought them in state court. However, as discussed above, the Kentucky law of claim preclusion only bars bringing the *same* cause of action twice. Stemler's claims for falsification of evidence and excessive force could have been brought in state court and were not. However, under Kentucky law, as she did not bring identical causes of action in state court, she is not barred from bringing them in federal court. *Yeoman*, 983 S.W.2d at 465. The district court did not err when it decided that claim preclusion did not apply to these claims.

Stemler, 350 F.3d at 592. The instant Petition does not contend that Stemler's claims are barred by the *Rooker-Feldman* doctrine.

RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. SINCE THE SIXTH CIRCUIT'S OPINION DID NOT IN EFFECT OVERRULE THE STATE COURT'S OPINION, THE *ROOKER-FELDMAN* DOCTRINE IS INAPPLICABLE TO THIS CASE.

The *Rooker-Feldman* doctrine prohibits federal courts other than the United States Supreme Court from reviewing state court proceedings to adjudicate federal claims which are "inextricably intertwined" with issues decided in state court proceedings. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, the Supreme Court held that the power to hear appeals from state court judgments is exclusively held by the United States Supreme Court. *Id.* at 415-16. *Feldman* held that lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims "inextricably intertwined" with issues decided in state court proceedings. 460 U.S. at 483.

The jurisdictional analysis thus hinges upon the meaning of "inextricably intertwined," which Justice Marshall defined as follows:

> While the question of whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil Company v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring). The Sixth Circuit's formulation of the doctrine is consistent with this Court's:

> The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Peterson Novelties, Inc. v. City of Berkley, 305 F.3d 386, 391 (CA6 2002) Thus, a federal claim is "inextricably intertwined" only if federal relief must be predicated upon a conviction that the state court was wrong.

In applying this doctrine to the present case, the precise issue is whether the Sixth Circuit's holding that Black was in police custody at the time of the police stop for purposes of Respondent's § 1983 action was a *de facto* reversal of the state court's dismissal of Respondent's wrongful death action. As stated above, the Kentucky Supreme Court emphatically held that the basis for affirming the summary judgment dismissal of the wrongful death claim was that there was no special relationship between Black and the officers at the time Kritis' truck struck the guardrail. Thus, as stated in the Sixth Circuit's opinion, federal relief most certainly can be granted in this case without overruling the Kentucky Supreme Court's holding. *Stemler*, 350 F.3d at 588-89. In their respective opinions, both the Kentucky Supreme Court and the Sixth Circuit expressly recognized that each was deciding the case before it on a separate set of facts: the collision facts being dispositive of the state claim and the police stop facts of the federal claim.

Any finding by the federal court that Black was in custody during the traffic stop would not implicitly require

a conclusion that the state court improperly decided ***the issues before it.*** As stated by the Sixth Circuit:

> The Kentucky Supreme Court's discussion of whether Black was ever in custody was dicta, and therefore any finding by the federal court that Black was in custody at some point during the encounter would not implicitly hold that the state court improperly decided *the issues before it*. The issue of Black's custody before the truck hit the guardrail was not an issue that was salient before the Kentucky court.

Stemler, 350 F.3d at 589.

While the Kentucky Supreme Court stated that there was no evidence in the record to support a finding that Black was "ever" in custody, ***the Kentucky Supreme Court's statement that Black was never in custody was not necessary to its judgment.*** The Kentucky Supreme Court's statement was pure *dictum*, and was implicitly recognized as such by the court's own opinion. The Kentucky Supreme Court specifically stated its ***holding*** as follows: "There is no evidence in the record from which it can be concluded that Black was in custody by the police or any state actor at the time the pickup truck struck the guardrail." *City of Florence*, 38 S.W.3d at 392.

As discussed earlier, application of the *Rooker-Feldman* doctrine requires only a consideration of whether the federal court must re-review issues that "actually arose" in the state court, or whether the state court wrongly decided "the issues before it." *Rooker*, 263 U.S. at 415-16; *Pennzoil*, 481 U.S. at 29; *see also Holloway v. Brush*, 220 F.3d 767, 778-779 (CA6 2000) (refusing to apply *Rooker-Feldman* where clear conceptual distinction existed between the state court holding and the issue before the federal court); *Peterson Novelties*, 305 F.3d at 392-93 (holding "[t]he state court certainly *could* have found the City in violation of its May 9 order, and it declined the opportunity to do so"; consequently, "it would

therefore be entirely possible for the district court in this case to provide Peterson federal relief not predicated upon a conviction that the state court was wrong, and for that reason the Rooker-Feldman doctrine does not preclude the court's adjudication"). Adhering to this Court's clear enunciation of the *Rooker-Feldman* doctrine, the Sixth Circuit did not in effect reverse the state court's opinion that there was no "special relationship" between Black and the police at the time of her fatal collision.

II. SINCE NEITHER A BROAD NOR A NARROW INTERPRETATION OF THE *ROOKER-FELDMAN* DOCTRINE IS APPLICABLE TO THIS CASE, IT IS UNSUITABLE FOR CLARIFYING THAT DOCTRINE.

Petitioners place great emphasis upon their argument that the lower federal courts are inconsistently applying the *Rooker-Feldman* doctrine. Petitioners claim that application of the "inextricably intertwined" test varies in the lower courts due to the Supreme Court's lack of guidance. Petitioners press this claim even though they acknowledge that the recent *Pennzoil* opinion clearly defined a federal claim to be "inextricably intertwined" where "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Petition for Writ of Certiorari, p. 9. Petitioners cite case law from varying circuits to illustrate their argument. When the "contradictory" cases cited by Petitioners are closely examined, it is clear that no contradiction exists. Moreover, the particular case at hand cannot serve to clarify the *Rooker-Feldman* doctrine because *Rooker-Feldman* is inapplicable under *any* interpretation of the doctrine by the lower courts.

Petitioners' analysis fails to acknowledge that the application of "inextricably intertwined" is unavoidably fact-intensive. The application of the rule is dependent upon the specific claims, the exact issues and the precise

facts confronting each state and federal court. For example, Petitioners compare *Stern v. Nix*, 840 F.2d 208 (CA3 1988) with *Centifanti v. Nix*, 865 F.2d 1422 (CA3 1989) and *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (CA10 1984), in support of their argument that *Rooker-Feldman* is applied inconsistently. Yet these cases have no relevance to the case *sub judice* because they merely involve the issue whether a constitutional challenge is general or connected to a particular case. This element of *Rooker-Feldman* is not at issue in the case at hand.

In fact, these cases show that *Rooker-Feldman* is applied consistently. The cases apply the exact same rule of law, but have different holdings due to significant variations in the facts being treated. The *Centifanti* court specifically distinguished its holding in *Stern* based upon the differences in the relief requested. *Stern* also specifically distinguished *Razatos* on the basis of the differing type of relief requested. The courts consistently applied the same *Rooker-Feldman* standard, but came to different conclusions based on the effect of the different remedies requested by the plaintiffs. Thus, Petitioners' citation to these cases, upon a closer look, serves only to illustrate that the lower courts consistently apply the same standard.

Petitioners also claim that the circuits are split in that some apply a "narrow" interpretation of *Rooker-Feldman* while others apply a "broad" interpretation. With regard to the case at hand, this is a distinction without a difference. Regardless of how broad or narrow *Rooker-Feldman* is applied, the federal claim in the case *sub judice* can be decided, and was decided, without impugning the soundness of the state court's decision.

For example, Petitioners cite *Moccio v. N.Y. State Office of Ct. Adm.*, 95 F.3d 195 (CA2 1996) as illustrative of the so-called "broad" interpretation. *Moccio* merely notes the occasional overlap of *Rooker-Feldman* with res judicata, and applies the local res judicata standard to determine if *Rooker-Feldman* applies. By that standard,

the question was whether the federal claim was "actually and necessarily decided in a prior proceeding." *Id.* at 200. Applying this res judicata standard to the case at hand does not change the outcome. Thus Chipman's § 1983 claim is not barred by the *Rooker-Feldman* doctrine because the custody issue before the federal court was not "actually and necessarily decided" by the Kentucky Supreme Court (as noted in the Sixth Circuit's opinion itself).

On the other hand, Petitioners cite *Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (CA9 2004) as applying a "narrow" interpretation of *Rooker-Feldman*:

> In this case, Kougasian has asserted no legal error by the state court. She is therefore not bringing a de facto appeal under Rooker-Feldman. Because she is not bringing a forbidden de facto appeal, there are no issues with which the issues in her federal claims are "inextricably intertwined" within the meaning of Rooker-Feldman. Therefore, even though Kougasian's remaining four causes of actions are essentially identical to the causes of action already adjudicated in Kougasian I and/or II, Rooker-Feldman does not bar Kougasian's federal suit on those causes of action.

Id. at 1143. Similarly, Chipman has not asserted legal error by the Kentucky Supreme Court. The Kentucky Supreme Court's *ratio decidendi* is unrelated to the issue which the Sixth Circuit was called upon to decide. Thus, using this "narrow" construction of *Rooker-Feldman*, it is likewise inapplicable. Respondent Chipman's claim is simply not an appropriate vehicle for redefining *Rooker-Feldman*.

III. PRIOR CASE LAW FROM THIS COURT PLAINLY PERMITTED RESPONDENTS TO FILE SIMULTANEOUS PARALLEL CLAIMS IN STATE AND FEDERAL COURT.

Petitioners argue that "[t]he Sixth Circuit's refusal to apply the Rooker-Feldman doctrine is an open invitation for parties to split their causes of action between state and federal courts, in derogation of well-established public policies." Petition for Writ of Certiorari, p. 13. Petitioners' argument, in other words, is that the *Rooker-Feldman* doctrine in effect outlaws the simultaneous litigation of parallel state and federal claims. The scant authority for this proposition cited in the Petition is readily distinguishable.

Although *Rooker-Feldman* does prohibit *de facto* appeals in federal district courts from state court judgments, it is certainly not an across-the-board prohibition of tandem litigation in state and federal courts. In fact, parallel state and federal litigation is "one of the hallmarks of our federal system." *Kougasian v. TMSL*, 359 F.3d 1136, 1143 (CA9 2004). Similarly, in *Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), this Court held:.

> Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense as well. While the railroad could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state courts. Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. In short, the state and federal courts had concurrent jurisdiction in this

> case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.

Id. at 295. There is no outright bar to parallel or related lawsuits in state and federal courts as Petitioners claim. *See, e.g., Princess Lida of Thurn & Taxis v. Thompson,* 305 U.S. 456, 466 (1939). Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. . . ." *Colorado River Water Conservation District No. 7 v. United States*, 424 U.S. 800, 817 (1976).

Support for this flexible policy lies in numerous doctrines that this Court has established regarding federalism and its impact on state court proceedings. Many safeguards exist to allow simultaneous state and federal actions while protecting against infringement on state rights by federal courts. To name only a few, the Younger doctrine, the Pullman doctrine, the England Reservation, pendency of actions and the principles of res judicata permit simultaneous federal and state court filings while protecting states' rights against federal encroachment. The England Reservation, for example, permits a plaintiff who goes to state court for a ruling on the state law question to preserve the right, either expressly or by implication, to litigate federal claims in federal court. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). Commenting on *England*, the Sixth Circuit thus noted:

> We realize that a party who is allowed to proceed in both federal and state forums may enjoy two bites of the apple. However, two safeguards exist. First, to the extent that a plaintiff does more than protect his rights under state law by fully litigating federal claims, *England* bars relitigation of those claims. Second, if a plaintiff attempts to split a cause of action between federal

> and state courts where abstention is inappropriate, the federal court may accord full preclusive effect to a prior state decision.

Wicker v. Board of Education of Knott County, 826 F.2d 442, 446 (CA6 1987).[3] Indeed, the *Rooker-Feldman* doctrine itself permits tandem federal and state court proceedings as long as the federal court does not sit in review of the state court's decision.

Respondent Chipman filed parallel complaints, one in state court and one in federal court, alleging separate claims for relief. Whereas Respondent asserted his wrongful death claim in state court, he properly asserted the § 1983 civil rights claim in federal court in accordance with 28 U.S.C. § 1331. While Respondents Chipman and Stemler could have brought all claims in one court, Respondents were not ***required*** to do so. Petitioners' assertion of a blanket prohibition against simultaneous suits in federal and state courts is totally at odds with the case law developed by this Court.

IV. THE SIXTH CIRCUIT CORRECTLY APPLIED KENTUCKY LAW IN REJECTING PETITIONERS' CLAIM PRECLUSION ARGUMENT.

Petitioners contend that the Sixth Circuit misapplied Kentucky law that defines "the same cause of action" element of the claim preclusion doctrine. Petitioners argue that this Court should apply a "transactional rule" to determine if the causes of action are the same for purposes

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[3] In their state court proceedings, Chipman and Stemler did not attempt to fully litigate their federal claims and, as discussed more fully below, they did not split a single cause of action as that concept is defined in settled Kentucky case law. In this latter regard, see especially *Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997), discussed below, where the Kentucky Supreme Court permitted separate negligence actions against the drunk driver who injured plaintiff and the vendor who sold liquor to the drunk driver.

of claim preclusion. Petitioners' argument is misplaced, as the transactional approach applies only to a subsidiary principle of res judicata known as "splitting the cause of action." Since Respondents did not split a single cause of action, this subsidiary rule does not come into play. Nevertheless, even under the transactional analysis, Respondents' claims are not barred. The governing principle, therefore (as the Sixth Circuit noted), is found in *Yeoman v. Kentucky Health Policy Board*, 983 S.W.2d 459, 465 (Ky. 1998), where the Kentucky Supreme Court held that claim preclusion does not apply unless the two causes of action are identical.

A. The Transactional Rule Is Inapplicable As Respondents Have Not Split Their Causes Of Action.

In fashioning their claim preclusion argument, Petitioners rely on two cases which are inapposite to the undisputed facts and procedural history of the case at hand, namely *Harris v. Ashley*, 165 F.3d 27 (CA6 1998) and *Dennis v. Fiscal Court of Bullitt County*, 784 S.W.2d 608 (Ky. App. 1990). These two cases, and the precedent for these cases, apply a transactional approach to determine if a single cause of action has been improperly split and therefore barred by res judicata. Splitting a cause of action is a subsidiary of res judicata that is not at issue in this case.

In *Harris, supra*, when his state complaint was dismissed, plaintiff subsequently filed suit in federal court. The Sixth Circuit stated, "the rule against splitting claims is nothing more than that aspect of res judicata which requires the court to determine the scope of the prior claim; i.e., to decide if the second action involves issues which should have been litigated in the first action, but were not" *Id.* at 27. The plaintiff clearly intended all his claims to be litigated in the original court, but filed a second complaint in an attempt to take a "second bite of the apple" **after his first complaint was dismissed.**

The court in *Harris* thus invoked the rule against splitting claims as set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 24 to conclude that the second complaint was properly barred. "Applying Kentucky law to the case at hand, it is obvious that *Harris's* prior whistleblower suit involved the same transaction as her current § 1983 suit: namely her vocal criticism of the Kentucky Department of Financial Institutions and her supervisor's decision to discharge her, allegedly in retaliation for that criticism." *Id.* In contrast, as recounted in detail above, Respondent's § 1983 claim herein does not hinge on the manner of Conni Black's death in colliding with the guardrail, the dispositive factual consideration in the state wrongful death claim, but rather hinges on the events occurring at the police stop.

In *Dennis, supra,* a terminated police officer's § 1983 action had been dismissed by the federal court on the basis of Kentucky's one-year statute of limitations for personal injury claims (the most closely analogous claim). The officer subsequently filed the same claims ("essentially mirrored the allegations") in state court. 784 S.W.2d at 609. The Kentucky Court of Appeals held that when the federal court had dismissed the civil rights claim based on limitations, the federal court opinion effectively dismissed the claim on its merits and thereby exercised pendent jurisdiction over the state law claims and dismissed them as well. *Id.* at 611. Applying the subsidiary rule set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), the court held that plaintiff improperly split his cause of action as "it is abundantly clear that appellant intended to litigate all his claims, those arising under both federal as well as state law, in federal court." *Id.* In contrast, in the case at hand, both the Kentucky Supreme Court and the Sixth Circuit recognized the critical legal and factual distinctions between a state wrongful death claim on the one hand and a substantive due process claim on the other. Whereas the former depended upon a special relationship between the police and decedent at the time of the guardrail collision, the latter depended upon the knowledge and conduct of

the police officers at the investigative stop which had preceded the fatal collision.

In sum, *Harris* is clearly distinguishable from the present case as Respondents filed ***simultaneous*** suits with the clear original intention of bringing two separate causes of action in federal and state court. Respondents in no way sought, nor currently seek, to "take a second bite of the apple," as *Harris* would discourage. Indeed, the thrust of the federal lawsuit was not to prove that there was a "special relationship" between Conni Black and the police at the time of the collision, but rather a custodial relationship based on the totality of the circumstances transpiring during the police stop. *Dennis* is similarly distinguishable from the case at hand. Respondents were in no way ***required*** to file suit in either state or federal court. Thus, the cause of action was not improperly split.

A closer examination of Kentucky case law on splitting a cause of action makes it even clearer that this doctrine is foreign to the case at hand. The chief precedential cases in Kentucky regarding claim splitting are *Kirchner v. Riherd*, 702 S.W.2d 33 (Ky. 1985) and *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985). In *Kirchner*, the plaintiff filed suit in circuit court for personal injuries suffered in an automobile accident. The defendant filed a motion to dismiss, pleading res judicata as a result of Riherd splitting his cause of action, having previously filed an action against the defendant in small claims court for property damage arising out of the same accident. The Kentucky Supreme Court held that splitting a cause of action bars a party who has sued for a part of an entire demand to sue for the residue in another action. *Kirchner* also cited the RESTATEMENT (SECOND) OF JUDGMENTS, § 24 (1982), for support. 702 S.W.2d at 34. Thus property damage and personal injury claims **arising out of the same accident** must be brought in one action. This of course does not mean that a state wrongful death claim arising out of a highway accident must be brought in the same case asserting a substantive due process claim arising out of a police stop.

Similarly, in *Egbert v. Curtis*, 695 S.W.2d 123 (Ky. App. 1985), the court barred a plaintiff from suing in district court after receiving judgment in small claims court. The court noted that a subsidiary rule of res judicata is that a cause of action may not be split and tried piecemeal. *Id.* at 124. The court found that the plaintiff's counterclaim was compulsory and thus belonged in the earlier litigation, and therefore was res judicata under the subsidiary rule prohibiting the splitting of a cause of action. *Id.*

In *Arnold v. K-Mart Corporation*, 747 S.W.2d 130 (Ky. App. 1988), where an employee lost an action in small claims and thereafter brought an action in circuit court, the opinion distinguished *Kirchner* and *Egbert*. In *Arnold*, the Kentucky Court of Appeals noted that the relief sought in small claims court, judgment for salary and benefits, was a different subject matter than damages requested of the circuit court for wrongful termination:

> In our view, the district court did not have to decide whether or not the termination was wrongful in order to find that K-Mart owed the salary and benefits. The question of the wrongfulness of the appellant's discharge is simply not 'material' or 'essential' to a determination of whether K-Mart owed a debt to the appellant. Therefore, the instant action is not barred by res judicata.

Id. at 133. A synthesis of these Kentucky cases shows that causes of action are improperly split only where a subsequent action is filed due to the failure of the first action, and the claims in the subsequent action were required to be brought in the original action.

The Kentucky courts frequently cite the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) in support of their holdings on splitting cause of action defenses. A review of § 24 reveals its inapplicability, and consequently the inapplicability of the rule against splitting a cause of action, to the present case. Section 24 states in relevant part:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Section 24 therefore applies only when a final judgment in one action serves to bar the plaintiff's claim in a second action. If that occurs, all claims that are part of the transaction are extinguished along with a plaintiff's second claim. This typically occurs in cases where a plaintiff receives an unfavorable result and brings a new set of claims against the same party. The purpose behind the rule, as stated by Petitioners, is to prevent a never-ending lawsuit. Hence, the rule applies to ***subsequent*** suits, not to parallel suits filed at the same time.[4]

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[4] *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 25(e) (1982), entitled "Exemplifications of General Rule Concerning Claim Splitting," which states that "A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground." The Restatement provides two illustrations to show when a second suit would not be permitted. The first illustration states that where a party's action is dismissed from federal court, and the party then seeks to commence an action for damages against B in a state court, the state court action is barred. The second illustration bars a subsequent suit when judgment is entered against a plaintiff in state court, and the plaintiff then subsequently attempts to bring an action against B in a federal court for the same action. The Restatement upon which Petitioners rely thus applies only to federal or state claims ***brought subsequent to*** the resolution of the original action.

The case *sub judice* is completely distinguishable from the Kentucky case law that applies the transactional rule to determine the extent res judicata bars claims that were improperly split. The rule against claim splitting exists to prevent "reactive claims," or claims which are brought subsequent to, or "in reaction to," a dismissal in order that the plaintiff can attempt to secure redress in another manner. Reactive claims are clearly an attempt to take two bites of the apple. Respondent's parallel, simultaneous suits were not improperly split, therefore the transactional rule does not apply. Respondents did not file a subsequent action after having lost a previous action. Nor were Respondents required to file their claims together in one court. Respondents exercised their right to choose a forum by filing simultaneous cases in order that their federal claim could be decided in federal court and their state claim in state court. The subsidiary rule to res judicata simply does not apply to this case.

B. The Transactional Rule Does Not Bar Respondents' Claims.

Although the case law makes clear that Respondents have not split their cause of action and the transactional rule therefore does not apply, application of the transactional rule to the present case illustrates the ultimate futility of Petitioners' argument. Assuming, for the sake of argument only, that Petitioners' "splitting the causes of action" argument is applicable, Respondents' claims are nevertheless not barred by the transactional rule.

Petitioners notably fail to define the full scope and limitations of the transactional approach in Kentucky case law. Petitioners cite *Harris v. Ashley*, 165 F.3d 27 (CA6 1998), as a case on point. *Harris* defines the transactional approach as follows:

> Like the Restatement, Kentucky law takes a transactional approach to determine whether there is a sufficient identity of causes of action – ***an approach which looks beyond the legal***

> ***theories asserted to see if the two claims stem from the same underlying factual circumstances***. In *Dennis*, for example, the court held that an assessment of identity of claims requires the court to look at claim ***in factual terms*** and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 27 (emphasis added). The *sine qua non* of the transactional approach is therefore an examination of the exact factual circumstances surrounding the separate claims. Where the claims do not stem from the same underlying factual circumstances, the claims are not required to be litigated in the same action. Thus, the *Harris* court found that the plaintiff's whistleblower suit and § 1983 suit were based on the same transaction because they stemmed from the exact same set of facts: plaintiff's vocal criticism of her employer.

Compare, however, *Watts v. K, S & H*, 957 S.W.2d 233 (Ky. 1997), in which the Kentucky Supreme Court reversed a decision by the Kentucky Court of Appeals applying res judicata to bar a dram shop action where the plaintiff had previously brought a negligence suit against the drunk driver to whom the dram shop defendant had sold liquor. *Id.* at 237. The *Watts* court explained that there was no identity between the two causes of action because the first action involved the drunk driver's negligence in operating the vehicle that collided with plaintiff, whereas the second action involved the liquor store's negligence in selling alcohol to the minor who later became drunk and collided with plaintiff. *Id.* at 238. "To put

it in transactional terms, the two cases did not arise from the same set of facts: the negligence action focused on the accident and the dram shop claim focused on the purchase of alcohol." *Harris*, 165 F.3d at 27 (discussing *Watts*). *Watts* thus expressed a clear limitation on the rule against splitting the cause of action: it does not apply where the cases do not arise from the same set of facts, even if those facts are causally related. Thus, even though the causes of action in *Watts* were both temporally and causally tied together in that the drinking precipitated the accident, the subsequent action was nevertheless not barred by claim preclusion because the legal/factual basis of each claim was sufficiently distinct. *See also Hays v. Sturgill*, 193 S.W.2d 648 (Ky. 1946) (holding will construction case sufficiently distinct from subsequent claim concerning grantor's soundness of mind).

In *Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808 (W.D. Ky. 2003), plaintiff brought suit in state court for breach of a sales contract on a vehicle and subsequently brought suit in federal court alleging violations of the Fair Credit Reporting Act. The court held that pursuant to *Watts* and *Hays*, the plaintiff's federal claims were not precluded:

> Though both lawsuits arise out of an automobile sale, the similarities end there. More simply put, the first case involves the sale price of an automobile and the second an arguable invasion of privacy. The first judgment is therefore not necessarily conclusive of matters which were not germane to, implied in or essentially connected with the actual issues in the case although they may affect the ultimate rights of the parties and might have been presented in the former action. Therefore, one cannot say that the breach of contract and Fair Credit Reporting Act claims involve relitigation of the same issues and facts.

> Kentucky's claim preclusion rule does not bar this action.

Id. at 814-815 (internal citations and quotations omitted).

Like the situations in *Watts, Hays* and *Smith*, Chipman's federal and state actions did not arise from the same set of facts: the state action focused on the accident and the federal claim focused on the police stop. Nor does Stemler's fabrication of evidence claim stem from the same set of facts underlying her state court claims. Thus, the facts involved in her fabrication claim are based on the individual actions of Officer Wince in the days and weeks subsequent to the police stop and Stemler's arrest. Petitioners' exceedingly broad application of "transactional nucleus" would lead to the unacceptable preclusion of claims that do not share a common core of related facts. It is irrelevant to a transactional analysis that the separate factual circumstances involve the same parties and occurred on the same date; it is also irrelevant in the case at hand that the police stop and the accident are causally related. What is essential to such an analysis is the clear delineation of disparate facts underlying separate causes of action. The police stop is ***not*** relevant to the state claim (as the Kentucky Supreme Court held), just as the accident scenario is ***not*** relevant to a determination of the federal claim (as the Sixth Circuit held). Nor are the events of the police stop or the accident scene relevant to Stemler's fabrication of evidence claim.

Regarding Stemler's excessive force claim, Petitioners would like to have their cake and eat it too. Petitioners argue against "splitting a cause of action" as they define it, yet argue that Stemler should have revived the excessive force claim in state court rather than federal court even though the only remaining claims were in federal court. The voluntary dismissal agreements, which Petitioners'

agreed to, permitted Stemler to revive her claim in either forum. *See, e.g., Stemler*, 350 F.3d at 591.

Petitioners' application of the transactional analysis is fatally flawed. Assuming *arguendo* that the transactional rule is applicable, it nevertheless does not bar Respondents' claims.

C. Respondents' Federal And State Causes Of Action Are Not "The Same" For Purposes Of Claim Preclusion.

The law regarding claim preclusion that Petitioners seek to apply is clearly not on point, as discussed above. The applicable rule of law is set forth in the recent seminal Kentucky Supreme Court opinion in *Yeoman v. Kentucky Health Policy Board*, 983 S.W.2d 459, 465 (Ky. 1998), which strikes the death knell to Petitioners' claim preclusion argument.

In *Yeoman*, the Kentucky Supreme Court took the opportunity to define the two components of res judicata. The issues arose in the context of a suit challenging the constitutionality of Kentucky House Bill 250, legislation aimed at making wide-ranging health care reforms. Since there had been litigation challenging earlier legislation which had included similar health care reform proposals (*viz.*, House Bill 1), the Court first had to resolve claims that the prior litigation would preclude the claim then before it. The Court rejected the applicability of claim preclusion finding that House Bill 250 was similar but not identical to House Bill 1.

Yeoman states that "claim preclusion bars a party from re-litigating a previously adjudicated cause of action." *Id.*, at 465 (emphasis added). *Yeoman* sets forth the elements of claim preclusion as follows: "First, there must be identity of the parties. Second, there must be identity of

the causes of action. Third, the action must have been resolved on the merits." *Id., citing Newman v. Newman,* 451 S.W.2d 417, 419 (Ky. 1978). Identity of the causes of action means "the subject matter of the subsequent suit must be identical." *Id.* Petitioners recognized as much in their brief, actually citing *Whittaker v. Cecil*, 69 S.W.3d 69 (Ky. 2002), as follows: " . . . the doctrine [of res judicata] does not act as a bar in a subsequent proceeding if the issues or questions of law are different. . . ." Petition for Writ of Certiorari, p. 25. In the absence of prohibited claim-splitting (i.e., two claims arising out of the exact same facts), *Yeoman* has made clear that the causes of action must be identical for claim preclusion to be applicable.

In the present case, the causes of action decided by the state court are clearly not identical to the causes of action before the federal court. Chipman's state wrongful death claim required a legal analysis of the existence of a "special relationship" between Black and the officers at the time the Kritis' truck struck the guardrail. Chipman's federal § 1983 claim required a legal analysis of the existence of "custody" of Black by the officers at the time of the police stop. Stemler's federal excessive force and fabrication of evidence claims were not considered by the state courts; therefore, under the third prong of *Yeoman*, the claims are not barred by claim preclusion because they were not resolved "on the merits." *See Yeoman, supra*, at 465.

CONCLUSION

The Sixth Circuit Court of Appeals was correct in concluding that the *Rooker-Feldman* doctrine is not applicable to the case at hand, whether that doctrine is construed broadly or narrowly. Likewise, Petitioners' claim preclusion argument is of no avail because Respondents'

substantive due process, excessive force and fabrication of evidence claims are neither factually nor legally the same as their state court claims. Therefore the Petition for Writ of Certiorari ought not to be granted.

Respectfully submitted,

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SUSAN STEMLER, Plaintiff-Appellant, v. CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; and JOHN DOLAN, Defendants-Appellees. WILLIAM CHIPMAN, Administrator of the Estate of Conni Black, Plaintiff-Appellant, v. CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; JOHN DOLAN; RON KENNER, Boone County Sheriff; ROB REUTHE; and CHRIS ALSIP, Defendants-Appellees.

No. 96-5993, No. 96-5996

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

126 F.3d 856; 1997 U.S. App. LEXIS 27677; 1997 FED App. 0300P (6th Cir.)

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JUDGES: Before: MERRITT, WELLFORD, and BOGGS, Circuit Judges. BOGGS, J., delivered the opinion of the court, in which MERRITT, J., joined. WELLFORD, J. (pp. 35-38), delivered a separate concurring opinion.

OPINION BY: BOGGS

OPINION:

BOGGS, Circuit Judge. In No. 96-5996, the estate of Conni Black (hereinafter "Black") appeals the judgment entered against her on her substantive due process claim against officers of Boone County, Kentucky, and of the City of Florence arising from her death in a car accident on the night of February 18, 1994, shortly after those officers removed her from the car of Susan Stemler and placed her in the truck of her drunk and violently abusive boyfriend, Steve Kritis. In No. 96-5993, Stemler appeals the judgment entered against her on her claims of false arrest, malicious prosecution, and violation of equal protection arising from her arrest at that time for driving under the influence; she alleges that the officers arrested her solely because they believed her to be a lesbian. For the reasons explained herein, with respect to both plaintiffs, we affirm the district court's award of summary judgment to the City of Florence and to the Boone County defendants in their official capacities. However, we reverse the dismissal of Black's complaint against the individual officers, and we also reverse the dismissal of Stemler's complaint against the individual officers with respect to her equal protection claim.

I. Background

A. The Assaults and Car Chase

On February 18, 1994, at about 10:45 p.m., Conni Black and her boyfriend, Steve Kritis, arrived at Willie's Saloon in the Ramada Inn in Florence, Kentucky.[1] Both Black and Kritis had been drinking heavily. While line dancing, Black met Susan Stemler. Around 2:00 a.m., the two went to the women's restroom and discussed problems that each had with their respective boyfriends. During this conversation, Black told Stemler that she wanted to leave Kritis. According to one witness, Christine Stillwell:

> Steve Kritis then burst into the restroom and slung the door to the restroom hard. He came into the restroom yelling. He stated in part: "If you don't get your fucking sister out of here, I'll kill the bitch." He yelled this at Laura Stemler.
>
> He grabbed Conni Black on the arm as he screamed at her. He slammed her against a toilet stall. He then yanked her out of the restroom. After he left the restroom, I could still hear him screaming outside of the restroom. . . . Conni came back into the restroom. He yanked her out physically of the restroom a second time.
>
> At this point, I wondered why nobody had called the police. When I went out of the restroom and into the lobby of the Ramada, I observed Kritis pushing Conni around in the

[1] The procedural postures of these cases are somewhat odd, since in both cases we are presented with an appeal from a dismissal under Rule 12(b)(6) with respect to some defendants and an appeal from summary judgment with respect to other defendants. Except where otherwise noted, this opinion will discuss the record evidence viewed in the light most favorable to the appellants.

> parking lot. As I went outside into the parking lot, I observed Kritis still pushing Conni. . . .
>
> Kritis put his forehead against Conni's and put his hands behind his back. For every step Conni took to flee Kritis, Kritis took one forward still pressing his forehead against hers. He then made a fist to hit her. He looked at me and saw that I was watching and released his fist.

According to Stemler, after Kritis removed Black from the restroom, Kritis slammed Black against a concrete wall in the hotel lobby; Black's head hit the wall and she briefly passed out. Black asked Stemler to drive her home, and Stemler agreed. As they were leaving, Kritis struck Stemler in the back of the head with a blunt object. Stemler and Black got into Stemler's car and drove away at about 2:15 a.m. Kritis pursued them in his truck. Kritis did not have his headlights on. At one point during the chase, Kritis rear-ended Stemler's car with his truck in an attempt to make her car stop. A witness, Terry Barker, was driving east on U.S. 42 in Florence at the time; he saw that Kritis was chasing the women and that the women were in obvious distress, and decided to follow the vehicles.

According to Barker, at one point the truck got ahead of the car and forced it down Woodland Avenue, which ends in a cul-de-sac. Stemler pulled her car into a driveway, and Kritis stopped his car behind her to block her access to the street. Fortunately, the driveway belonged to William Minnick, a retired Florence police officer. His wife, Nancy Minnick, heard a horn blowing at about 2:30 a.m. When she opened her door, she saw Kritis standing in her driveway on the passenger side of the car. Kritis was hitting the car window and yelling. The car backed out

around the truck and drove up the street. Kritis jumped in the car and again gave chase; according to Barker, he was driving at about sixty miles per hour on the sidewalk of the residential street. By this point, Mr. Minnick was awake and dressed; he called 911, and then got in his car and followed Kritis and Stemler. Barker also continued to follow them.

B. The Police Stop

After the vehicles pulled back on to U.S. 42, they stopped at a light at Tanners Lane. Barker flashed his lights to alert a nearby police officer, defendant Lieutenant Thomas Dusing, an officer of the Florence Police Department, who was responding to the 911 call. When Dusing pulled up to Barker, Barker informed him that there was a "serious problem" with the two vehicles ahead of him, and that Kritis appeared to be a threat to the safety of the two women. After speaking with Barker, Dusing pulled his cruiser in front of Stemler's car and Kritis's truck at the intersection. As he left the cruiser, Stemler jumped out of her car and ran to him. Stemler told Dusing that Kritis was drunk, that he had assaulted both her and Black, that he had threatened to kill her, and that he had placed both of them in danger by chasing after them at high speed. She was obviously emotionally distraught, and cried while she related the evening's events to Dusing. While Dusing spoke with Stemler, four other officers arrived at the scene in separate cars: officers Bobby Joe Wince and John Dolan of the Florence Police Department, and officers Rob Reuthe and Chris Alsip of the Boone County Sheriff's Office. Each of the four would later be named as defendants in this litigation along with Dusing.

During Stemler's conversation with Dusing, Reuthe approached Kritis, who was seated in his truck. According to Reuthe's testimony, Kritis told him that Stemler was a lesbian,[2] and that she was kidnapping his girlfriend. After speaking with Stemler, Dusing approached Reuthe; Dusing would later testify that Reuthe told him at that time that Stemler was a lesbian. Reuthe also told Dusing that Kritis smelled of alcohol, but that he had not tested Kritis for intoxication. Dusing then approached Kritis, who repeated his assertion that Stemler was a lesbian. Kritis also asked Dusing to bring Black to his truck; Dusing told him that he would see what he could do. Dusing asked Kritis whether he had seen Stemler driving the car, and whether he would be willing to testify against Stemler.

Dusing would later submit a police report claiming that he did not smell alcohol on Kritis's breath at that time. This claim is contrary to his contemporaneous statements to Wince and to Mr. Minnick that Kritis smelled of alcohol. A blood test taken over two hours later would reveal that Kritis had a blood alcohol level of .115, which indicates that at the time of the police stop, his blood alcohol level was probably between .155 and .175, at least one-and-a-half times the legal limit in Kentucky of .10.[3] Subsequent observers would also testify that, over an hour after the police stop, it was immediately apparent that Kritis was very drunk. Nevertheless, neither Dusing nor any other officer ever tested Kritis for intoxication, or even asked him to step out of the truck.

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[2] Stemler denies that she is a lesbian.

[3] Both Black's complaint and Stemler's complaint allege that Kritis's blood alcohol level at the time of the police stop was .20.

At some point, Dusing asked Wince to test Stemler for intoxication. By that time, Wince had already heard Kritis's allegation that Stemler was a lesbian. Wince did not find any of the standard DUI indicators in examining Stemler; she did not have affected speech, impaired balance, impaired walking, or impaired coordination, and she did not seem disoriented. According to Wince, Stemler failed the horizontal nystagmus gaze field test, a test in which uncontrolled movement in a suspect's eyes may indicate drunkenness. However, Stemler alleges that Wince did not know how to perform that test properly, and had to ask for assistance with the test from Dolan. Stemler alleges further that Dolan also did not know how to perform the nystagmus test. Wince testified that the breathalyzer revealed a blood alcohol level of .105.[4] Stemler alleges that the breathalyzer was not properly calibrated.

After performing the field tests, Wince conferred with Dusing and Dolan. By this time, all three officers had heard Kritis's claim that Stemler was a lesbian. Dusing decided that they should arrest Stemler for driving under the influence, and the other officers agreed. Dusing would later concede that, in deciding to arrest Stemler and not Kritis, he relied on Kritis's version of events more than he did Stemler's. Wince approached Stemler, informed her that she was under arrest, and asked her who she would like to tow her car. Stemler broke into tears, pointed at Kritis, and asked Wince, "Aren't you going to check him? Why don't you check him?" As she was pointing, Wince

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[4] Stemler's complaint alleges that she had a blood alcohol level below .10 at the time of the police stop.

grabbed her arm, pulled it behind her, and placed her in handcuffs.[5]

At approximately the same time, two unknown officers, one each from Florence and from Boone County, approached Barker, who was parked across the street. Barker related the complete story of the chase to both officers. Barker overheard one of the officers relating his story to a third officer. The officers asked him whether he saw Stemler driving the car, and whether he would be willing to testify against Stemler in court. Upon learning that Stemler was being placed under arrest, Barker told the officers that they were arresting the wrong person and that Kritis was obviously "crazy"; the officers didn't appreciate that, became "arrogant," and told him that he didn't "know what's going on" and that he could "go on about your business." Barker was dumbfounded and angered by the officers' actions. Barker confirms that the police never asked Kritis to leave the truck, despite the fact that, as during the chase, Kritis still had not turned his headlights on. Although the officers told Barker that they would contact him to be a witness against Stemler, they never did so. Furthermore, Wince failed to list Barker as a witness at the scene in his field notes, and the card on which the officers supposedly were writing down Barker's name and telephone number was lost.

While Wince was testing Stemler for intoxication, Mr. Minnick arrived at the scene. He spoke first with defendant Boone County Officer Chris Alsip. Alsip immediately

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[5] In her complaint, Stemler alleges that Wince used excessive force in handcuffing her. The district court denied Wince's motion to dismiss this claim; however, Stemler has voluntarily dismissed her excessive force claim.

"informed" him that Stemler was a lesbian. Minnick thought that it was odd that Alsip could state that fact with such certainty, given that Stemler had out-of-state license plates. Wince also made a point of informing Minnick that Stemler was a lesbian. Although the officers at the police stop were aware that Minnick had observed Kritis chasing Stemler, they asked him only whether they observed Stemler driving her car.

Dusing ordered Dolan to approach Black, who was still in the passenger seat of Stemler's car, and to inform her that she would be arrested for public intoxication "if she didn't want to leave with the male." At that time, Black was very intoxicated; her eyes were glassy and she slurred her words. Alsip and Dolan lifted her out of the car and assisted her to Kritis's truck. Black stumbled as she walked to the truck. Alsip physically placed her into the passenger seat in the truck. Alsip would later admit that he never heard Black say that she wanted to leave with Kritis.[6] Dusing told Alsip only that Stemler was a lesbian and that Kritis did not want his girlfriend with her; Alsip would later concede that, if he had known of all the preceding events that evening, he would not have placed Black in the truck but instead would have arrested Kritis.

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[6] Black's complaint alleges that, "having lost the assistance of Susan Stemler, under threat of arrest and against her will," she capitulated and allowed herself to be placed into Kritis's truck. Dolan testified that Black asked if she could leave with Kritis; however, Black's estate argues that Dolan had an incentive to be untruthful on this point, and that the issue of his veracity should be reserved for the factfinder. Given the officers' admissions that Dusing ordered Dolan to threaten Black with arrest, and Black's earlier unwillingness to leave with Kritis, a view of the evidence most favorable to Black would indicate that she involuntarily left the scene of the police stop with Kritis.

C. The Subsequent Accident

As soon as Black was in the truck, at about 3:00 a.m., Kritis drove away. Kritis drove two blocks from the police stop and then turned onto the northbound lanes of I-75. Black had passed out in the truck. According to Kritis, when she woke up, she "went haywire" and began hitting him; he hit her back and lost control of the truck. The truck swerved to the right and collided side-to-side with a guardrail. The impact threw Black partially out of the passenger side window. Black's arm was completely severed from her body and her head was severed into two parts. The truck was damaged and the front tire was blown. Kritis continued to drive slowly on I-75 and then east on I-275 until the truck could proceed no further.

A passing motorist, Kristopher Waldespuhl, was waved down by Kritis around 3:45 a.m. Kritis said, "my girlfriend is kind of hurt," and asked for help. According to Waldespuhl, Kritis spoke "very nonchalantly," and "had no emotions at all, wasn't upset." It was immediately obvious to Waldespuhl that Kritis was drunk; Kritis had alcohol on his breath, his eyes were glazed and bloodshot, and he was not acting sober. Kritis admitted to Waldespuhl that he was drunk. He also told Waldespuhl that "they were fighting at Willie's and some dyke bitch took her from me." Waldespuhl walked over to the other side of the truck. It was immediately apparent to Waldespuhl that Black was dead, although Kritis was unaware of this fact. Waldespuhl left to place a 911 call.

Officer Stephen Johnson of the Lakeside Park-Crestview Police Department arrived at the scene. It was obvious to Johnson that Kritis was drunk; he did not even need to conduct a field sobriety test to determine that he

had probable cause to arrest Kritis. Another officer at the scene, Mike Mann, also immediately determined that Kritis was drunk. According to Mann, "Steve Kritis told me that he and his girlfriend were fighting and exchanging blows. He stated that he felt a large 'thud' but continued driving the truck. His truck started to quit and he pulled over." Johnson placed Kritis under arrest for driving under the influence at 4:30 a.m.[7]

An accident reconstruction specialist, Detective Jack Prindle, determined that, at the time of the impact with the guardrail, the truck was traveling at sixty-six miles per hour. The truck had traveled from the scene of the police stop to the scene of the accident in about five minutes. The accident occurred when the steering wheel turned abruptly to the right; there is no way to know what caused the wheel to turn. As the vehicle struck the guardrail, Black was partially ejected, causing her head and right arm to be severed on the guardrail. Kritis continued on for 2.5 miles before stopping.

D. Stemler's Prosecution

After arresting Stemler, Wince took her for a blood test. Stemler claims that she had had only a half-glass of beer and two Irish coffees over the course of the night. She suspects that the officers tampered with her blood sample, which allegedly revealed a .17 blood alcohol level an hour after the breathalyzer allegedly revealed a .105 blood

[7] Kritis would subsequently plead guilty in the Boone County District Court to manslaughter in the second degree and to wanton endangerment in the first degree. He was sentenced only to probation. After violating the terms of his probation, he is now serving a five-year prison sentence.

alcohol level. Wince handled her blood sample after he learned that Black had died. Larry Dehus, a "forensic scientist," reviewed the specimens and the timing of the tests and concluded that the sample's integrity had been destroyed, given that Wince waited five days to deliver the sample and that there were no procedures to guard against tampering. When a blood sample is submitted to the detective's office of the Florence Police Department, the clerk of that office, Mary Hayes, is supposed to receive a property card and an evidence tag; Hayes never received either with respect to Stemler's blood sample. This was a violation of department policy. Stemler's sample was the only sample that Wince had ever kept in the Florence Police Department refrigerator for five days in his career, and was also the only sample that he had ever personally driven to the lab. According to Officer Chester Snow, who supervised the property room, it would be "highly irregular" to keep a sample in the refrigerator for five days.

Stemler was prosecuted in the Boone County District Court for driving under the influence of alcohol. She defended the charge on the ground that the evidence against her had been fabricated. Dr. Gordon James testified at her trial that the handling of the blood sample was "arbitrary" and that the chain of custody had not been established. Her first trial resulted in a hung jury. She was retried. Although Wince claimed at Stemler's first DUI trial that he had not completed an evidence card, at the retrial he produced a completed card which neither Hayes nor Snow had ever seen. He claimed that he completed the card on February 19, at the time of the arrest; Hayes testified that if that were true, she should have seen the card. The second jury acquitted Stemler.

E. Related State Court Proceedings

On March 7, 1994, Black's estate filed a wrongful death action under Kentucky law against each of the defendants in this case in the Boone County Circuit Court. *Chipman v. Florence,* No. 94-CI-00202. Stemler also brought suit against the defendants herein in the Boone County Circuit Court, raising state-law claims of malicious prosecution, false arrest, abuse of process, assault and battery, false imprisonment and negligent or intentional infliction of emotional distress. *Stemler v. Florence,* No. 94-CI-00459. The state court consolidated the two suits, and in separate orders on April 2 and April 26, 1996, it awarded the defendants summary judgment on all claims except Stemler's assault and battery claim against Wince. Stemler voluntarily dismissed that claim. Both Black and Stemler have appealed the judgments against them, and their appeals are pending in the Kentucky Court of Appeals.

F. Proceedings Below

On March 31, 1994, William Chipman, the administrator of the estate of Conni Black, filed a complaint in the United States District Court for the Eastern District of Kentucky against Dusing, Dolan, Wince, Reuthe, and Alsip. The complaint also named the City of Florence and Ron Kenner, the Boone County Sheriff.[8] The complaint

[8] The appellees have informed the court that Kenner died on May 11, 1997. The appellees should have informed the court at the same time of the identity of Kenner's successor. *See* FED. R. APP. P. 43(c). Since Black sued Kenner only in his official capacity as Boone County sheriff, for the purposes of this appeal we will treat the claims against

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alleged that the defendants were liable under 42 U.S.C. § 1983 for Black's wrongful death, insofar as the defendants had displayed deliberate indifference in placing her in the car in which she was later killed. On August 2, 1994, the district court granted the individual officers' motions to dismiss under FED. R. CIV. P. 12(b)(6) on the ground of qualified immunity. *Chipman v. City of Florence,* 858 F. Supp. 87 (E.D. KY. 1994), *reconsideration denied on amended complaint,* 866 F. Supp. 332 (E.D. KY. 1994). On July 3, 1996, the district court granted the City of Florence's and Boone County's motions for summary judgment. Black now appeals, and her appeal is pending under docket number 96-5996.

On January 24, 1995, Susan Stemler filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Kentucky against Wince, Dusing, Dolan, and the City of Florence. The complaint alleged claims of excessive force, wrongful arrest, malicious prosecution, and violation of equal protection on the bases of sex and sexual orientation. On October 6, 1995, the district court granted the individual officers' motion to dismiss on grounds of qualified immunity. On July 3, 1996, after consolidating Stemler's case with Black's, the district court awarded summary judgment to the City of Florence. Stemler now appeals both orders, and her appeal is docketed in this court as No. 96-5993.

We have consolidated the two appeals for consideration. We will consider first both plaintiffs' claims against the municipal defendants, then Black's claims against the

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him and the other Boone County defendants in their official capacities as a suit directly against Boone County.

individual officers, and finally Stemler's claims against the individual officers.

II. Municipal Liability Under § 1983

We may easily dispose of the claims against the City of Florence and Boone County. While a municipality may be held liable under 42 U.S.C. § 1983 for a constitutional violation directly attributable to it, § 1983 does not impose vicarious liability on a municipality for the constitutional torts of its employees. *See Monell v. Department of Soc. Servs. of the City of New York,* 436 U.S. 658, 692, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Therefore, in order to state a claim against a city or a county under § 1983, a plaintiff must show that his injury was caused by an unconstitutional "policy" or "custom" of the municipality. *See Pembaur v. City of Cincinnati,* 475 U.S. 469, 480-81, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986). The plaintiffs both assert that they were injured by the municipalities' allegedly deficient training programs. Where, as here, the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Board of County Comm'rs of Bryan County v. Brown,* 137 L. Ed. 2d 626, 117 S. Ct. 1382, 1390 (1997) (quoting *City of Canton v. Harris,* 489 U.S. 378, 388, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989)). "'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown,* 117 S. Ct. at 1391. In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be "plainly obvious." *Id.* at 1393.

As noted above, in the present case, both Stemler and Black argue that the municipalities should be held liable as a result of their failure to train their officers adequately. Neither plaintiff has demonstrated that there is a genuine issue of material fact as to whether the training programs were adequate, or as to whether the city or the county acted with deliberate indifference to the risk of a constitutional violation. Officers of both the city and the county are required to attend the Basic Police Academy of the Kentucky Justice Cabinet Department of Criminal Justice Training. The academy is a 400-hour course in which officers are taught the elements of criminal offenses under Kentucky law, the definition of probable cause, and procedures for the handling of evidence. At the academy, officers are also taught how to ensure the safety of potential victims of domestic violence. In addition, both the city and the county require their officers to attend a forty-hour training class every year; this program also includes training as to the proper response to an allegation of domestic violence. Neither Stemler nor Black have identified any reason to believe that the training programs were inadequate in any way. Each argues only that the defendant officers lacked complete familiarity with their department's policy manuals; however, neither plaintiff asserts any reason to believe that the city or the county did not take proper steps to ensure that their officers knew and complied with their policies.

Furthermore, a plaintiff ordinarily cannot show that a municipality acted with deliberate indifference without showing that the municipality was aware of prior unconstitutional actions of its employees and failed to respond. *See Brown,* 117 S. Ct. at 1390; *Canton,* 489 U.S. at 390-91. The plaintiffs are unable to identify any prior instances of

misconduct in the Boone County Sheriff's Department. With respect to the City of Florence, they argue only that Wince had once had a sexual harassment complaint filed against him by a co-worker.[9] However, there is no indication that the city failed to respond appropriately to that complaint, or that because of that one complaint it should have been "plainly obvious" to the city that Wince would falsely arrest a woman solely on the basis of her perceived sexual orientation or force a woman against her will into the truck of a drunk and violently abusive man. Therefore, because the plaintiffs cannot show that either the city or the county acted with deliberate indifference to the risk of a constitutional tort, the award of summary judgment to the municipal defendants must be affirmed.

III. Black's Substantive Due Process Claim

A. Test for Qualified Immunity

We turn now to the merits of Black's claim against the individual officers. She alleges that the officers violated her right to "substantive due process"[10] under the Fourteenth

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[9] During the course of discovery, Stemler was denied access to the defendants' personnel files. Instead, the magistrate judge conducted an in camera review of those files and determined that they did not contain relevant evidence. Stemler now claims that the magistrate judge erred and that the files may contain evidence of other incidents to which the City of Florence failed to respond. However, she has waived this claim by failing to appeal the magistrate judge's ruling to district court. *See* FED. R. CIV. P. 72(a).

[10] In contrast to procedural due process, which guarantees that individuals will be afforded fair procedures before they are deprived of life, liberty, or property, substantive due process protects individuals against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). *But cf.* JOHN HART ELY,

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Amendment by forcing her to leave the scene of the police stop in Kritis's truck. In other words, her claim is that the officers deprived her of her liberty (and, ultimately, her life) without due process of law by threatening to arrest her if she did not leave with Kritis, and by physically placing her against her will in his truck. Because Black seeks to hold the officers liable in their individual capacities under 42 U.S.C. § 1983, she must show not only that the officers' actions were unconstitutional, but also that they should have known at that time that they were violating her rights. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

> It is not necessary that the very action have been previously held unlawful but, given the preexisting law, the unlawfulness of the conduct must have been apparent. In determining whether an official is entitled to qualified immunity, this court asks whether the law was clearly established at the time of the alleged action.

Barton v. Norrod, 106 F.3d 1289, 1293 (6th Cir. 1997) (citation omitted). In determining whether the officers should have known in February 1994 that their actions

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DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (suggesting that non-textual constitutional claims would be better analyzed under the Privileges and Immunities Clause of the Fourteenth Amendment; "Familiarity breeds inattention; and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms – sort of like 'green pastel redness.'").

were unlawful, we look primarily to decisions of the Supreme Court, this court, and other courts within our circuit. *See Cagle v. Gilley,* 957 F.2d 1347, 1348 (6th Cir. 1992).

We review the district court's determination that the officers were entitled to qualified immunity *de novo. See Barton,* 106 F.3d at 1293. In the present case, the district court reviewed the relevant case law dealing with claims that state actors violated substantive due process by allowing individuals to become subject to an indirect harm, and found much of that law to be confused and in conflict. It then appeared to reason that, since the doctrine of substantive due process was unclear in its entirety, no such claim could ever survive a motion to dismiss on the ground of qualified immunity: "This inquiry shows that the law in this area is unclear and that not only would no reasonable police officer have known what duty was owed to the plaintiff under the facts alleged in this case, but even the Supreme Court is uncertain on the matter." *Chipman v. City of Florence,* 858 F. Supp. 87, 90 (E.D. Ky. 1994) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 199, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989)) (dismissing complaint); *see also Chipman,* 866 F. Supp. 332, 335 (E.D. Ky. 1994) (denying motion for reconsideration).

This was error. While, as we will see below, there is a good deal of uncertainty with regard to the precise contours of substantive due process, it does not follow that state actors are insulated from liability on all such claims, no matter what the underlying facts may be. The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the

constitutional guarantee, as that guarantee was understood at the time of the violation.[11] Stated differently, it is simply irrelevant that the definition of the right to substantive due process has been in flux if, under any definition found in the case law at the time, the defendants should have known in February 1994 that their actions violated that right.

B. Custody Establishes the Existence of a Duty

We therefore proceed to determine whether the individual officers violated law that was clearly established in February 1994 when they forced Black into Kritis's truck. When, as here, a plaintiff alleges that state actors violated substantive due process by placing her at risk of harm from a third party, the court is presented with two distinct, though interrelated inquiries. First, in order to find for the plaintiff, the court must conclude that the plaintiff and the state actors had a sufficiently direct relationship such that the defendants owed her a duty not to subject her to danger. Second, the court must also conclude that the officers were sufficiently culpable to be liable under a substantive due process theory.

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[11] An instructive parallel: the district court's theory is analogous to an attempt to strike down a statute as unconstitutionally vague on its face because the application of the statute is not clear at the margins. Such an attempt will be unavailing, since federal courts will consider a facial vagueness claim only if a statute is unconstitutionally vague in all possible applications. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982). Similarly, the mere fact that a state actor may be entitled to qualified immunity on some claims under a particular constitutional theory because the law is unclear in some respects does not imply that he will be immune from any and all suits arising under that theory.

With respect to the first question, while the state does not owe its citizens a constitutional duty to keep them from harm in all circumstances, it has been clearly established that such a duty will arise when the state has acted to deprive an individual of certain indicia of liberty:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) (citation omitted); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-16, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982) (involuntarily committed mental patients have substantive due process right, analogous to Eighth Amendment right of prisoners, to protection from harm). In the present case, Black's complaint alleges – and the record evidence could reasonably be read to show – that the officers threatened to arrest her if she did not leave in Kritis's truck, and they physically lifted her out of Stemler's car and placed her in the truck against her will. In so doing, the officers took the "affirmative act of restraining [Black's] freedom to act on her [own] behalf," and consequently imposed upon themselves a duty to ensure that they were not placing her in

danger. Their actions were, in the words of *DeShaney,* a restraint on Black's personal liberty, not a failure to act on her behalf. *See also Collins v. City of Harker Heights,* 503 U.S. 115, 127, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

The defendants rely on *Foy v. City of Berea,* 58 F.3d 227 (6th Cir. 1995), to argue that they did not infringe Black's liberty. In *Foy,* the plaintiff had been drinking in a dormitory with his friends. After receiving a complaint, the police came to the dormitory and told them, "Get in your car and get out of here or somebody is getting arrested." Although the police had told them only to leave the premises, the plaintiff and his friends then decided to take a lengthy drive from Berea, Kentucky, to Crestline, Ohio. Forty-five minutes into that journey, the driver crashed the car, killing Foy. This court held that the defendant police officers had not violated Foy's right to substantive due process, since there was no restraint on his liberty that had caused him to keep driving. *Id.* at 230. The defendants also rely on *Walton v. City of Southfield,* 995 F.2d 1331 (6th Cir. 1993). In *Walton,* we held that police officers who had arrested the driver of a car, and who had abandoned in a nearby building the children (ages 15 and 2) who were the passengers of that car – but who had never taken the children into their custody – were entitled to qualified immunity from a substantive due process challenge.

Neither case is apposite. In the present case, Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers. Unlike *Foy,* Black never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in effect ordered her to do so; her fatal accident occurred

about five minutes after the truck left the police stop. Furthermore, unlike *Walton,* Black was in the custody of the defendant officers in the sense that they had affirmatively acted to deprive her of her liberty, rather than merely negligently refused to act to protect her. *See Walton,* 995 F.2d at 1336-37. In sum, neither *Foy* nor *Walton* did anything to alter the clear and simple rule that state actors owe a duty of care to those individuals of whom they deprive their liberty, and a reasonable jury could conclude that the officers had deprived Black of her liberty by placing her in the truck or by threatening her with an arrest that would have been unwarranted under Kentucky law. *See* Ky. Rev. Stat. § 222.202 (offense of public intoxication involves drinking in public or endangering one's self, other persons, or property).

While it is clear that the state owes a duty of care to an individual who has suffered a deprivation of liberty by the state – *e.g.,* an individual who has been in the state's custody – there is also dicta in *DeShaney* that suggests that the state may also owe a duty to individuals in non-custodial settings:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.

489 U.S. at 201. A number of courts have relied on this language to hold that the state may owe an individual a duty of care under substantive due process, even if the individual is not in the state's custody, if the state has created a risk of harm to the individual. *See Kneipp v. Tedder,* 95 F.3d 1199, 1206-09 (3d Cir. 1996) (collecting cases). Our court has suggested in dicta that *DeShaney*

stands for the proposition that "a duty to protect can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." *Gazette v. City of Pontiac,* 41 F.3d 1061, 1065 (6th Cir. 1994). The defendants argue that this rule was not clearly established in February of 1994, and remains unclear today. We need not opine as to the circumstances under which a substantive due process claim in a non-custodial setting is possible, or as to whether that possibility had been clearly established in 1994. Under any definition of the term, Black was in the defendant officers' custody at the time she was forced into Kritis's truck. Because we, unlike the district court, believe that any uncertainty at the margins of the *DeShaney* test is not relevant to Black's claim, we hold that the defendants should have known under clearly established law that they owed Black a duty not to force her into harm's way.

C. The Defendants Violated Their Duty to Black by Exhibiting Deliberate Indifference to Her Fate

Our holding that the officers owed Black a duty of care does not end our inquiry, for we also must determine what duty of care they owed, and whether they breached that duty. Over the last decade, the Supreme Court and this court have gradually defined the level of culpability with which a state defendant must act in order to be held liable for a violation of substantive due process. In *Daniels v. Williams,* 474 U.S. 327, 334 n.3, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986), the Supreme Court held that an allegation of simple negligence would not be sufficient to support a due process claim, but reserved judgment as to whether an allegation of gross negligence would suffice. In *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987) (en banc),

this court answered that reserved question in the affirmative. In that case, the plaintiff had been killed by an inmate who stopped her by using a patrol car that he had been allowed to use by county officials despite repeated warnings. We held that the plaintiff had stated a substantive due process claim:

> The allegation in the present complaint of gross negligence on the part of the defendants was sufficient to charge them with arbitrary use of government power . . . . . [A] person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

Id. at 282.

This aspect of *Nishiyama* has since been further refined. In *Lewellen v. Metropolitan Gov't of Nashville & Davidson County,* 34 F.3d 345 (6th Cir. 1994) – a case decided after the defendant officers forced Black into Kritis's car – we held that, with respect to non-custodial cases, *Nishiyama* was no longer an accurate statement of the law after *DeShaney* and *Collins v. City of Harker Heights,* 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). In holding that a school board's negligence in building a school too close to a power line was not actionable under § 1983, we set forth a new test: "What seems to be required is an intentional infliction of injury . . . or some other governmental action that is 'arbitrary in the constitutional sense.'" *Lewellen,* 34 F.3d at 351 (quoting *Collins,* 503 U.S. at 129); *see also Gazette,* 41 F.3d at 1067 (gross negligence is not actionable under substantive due

process). We also expressed doubt as to whether even deliberate indifference by state actors could give rise to a substantive due process claim by a plaintiff who was not in the custody of the state. *Lewellen,* 34 F.3d at 350 n.4.

Of course, the phrase "arbitrary in the constitutional sense" is not self-defining; indeed, in *Collins,* the only elucidation that the Supreme Court provided for that phrase was a reference to the old chestnut of substantive due process claims, "conscience shocking." 503 U.S. at 128. The defendants' argument is essentially that Black's claim fails the test of *Lewellen* and *Collins* because there is no law now, nor was there in 1994, clearly specifying any area of liability under substantive due process. In essence, they argue that there is no clearly established law holding that they have any duty to persons in their custody. As they conceded at oral argument, under their theory, they would not be liable even if they physically carried Black to the middle of a busy highway and left her there. However, *Collins* carefully noted that its holding was limited to those cases where a plaintiff was not in the custody of the state, and specifically reaffirmed the established law that the state is required to take care to protect persons in its custody from danger. *See Collins,* 503 U.S. at 127; *see also Lewellen,* 34 F.3d at 350 n.4. Since, as we have held above, viewing the facts in her favor, Black was in the defendants' custody at the time that they forced her into Kritis's truck, they owed her a duty not to endanger her safety.

In cases such as this one, where the plaintiff suffered injury as a result of being placed in the state's custody, it has consistently and uncontroversially been the rule that a constitutional claim arises where the injury occurred as a result of the state's deliberate indifference to the risk of such an injury. *See Farmer v. Brennan,* 511 U.S. 825, 834,

128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994); *Wilson v. Seiter,* 501 U.S. 294, 303, 115 L. Ed. 2d 271, 111 S. Ct. 2321 (1991); *Estelle v. Gamble,* 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). Although each of these cases involved an Eighth Amendment claim raised by a prisoner, we have consistently held that at least the same standard applies to substantive due process claims raised by other persons in the custody of the state. *See Durham v. Nu'Man,* 97 F.3d 862, 869 (6th Cir. 1996) (patient at state mental hospital), *cert. denied,* 137 L. Ed. 2d 496, 117 S. Ct. 1337 (1997); *Lintz v. Skipski,* 25 F.3d 304, 306 (6th Cir. 1994) (children in state foster home); *Heflin v. Stewart County,* 958 F.2d 709, 713-14 (6th Cir. 1992) (pretrial detainee); *Meador v. Cabinet of Human Resources,* 902 F.2d 474, 476 (6th Cir. 1990) (children in state foster home). While *Lewellen* may have declared that the range of culpable conduct is narrower in cases where the plaintiff is not in the state's custody, it did nothing to change the standard of deliberate indifference in cases involving a custodial relationship. *See Foy,* 58 F.3d at 232 (noting distinction). In cases in which a plaintiff alleges an injury arising out of the state's custody over her, the deliberate indifference test ensures that injuries arising out of truly arbitrary governmental action are compensated, while at the same time avoiding the imposition on to the states of a broad, federalized system of tort law. We therefore reaffirm the application of that test today.

We again note that the district court erred in holding that the entire field of substantive due process law regarding state liability for indirect injury was not clearly established in 1994. *See Chipman,* 858 F. Supp. at 90. Although the discussion above reveals that there is obviously considerable uncertainty at the margin, the core principle

that the state must not act with deliberate indifference to the risk of injury to persons in its custody is well-established. In the present case, we believe that Black's complaint, as well as the record evidence read in the light most favorable to her, supports a claim that the defendant officers acted with deliberate indifference to the threat of injury to her. They knew, or reasonably should have known, that Kritis was unfit to drive. They knew, or reasonably should have known, that Kritis had assaulted her earlier in the evening and had threatened to hurt her. Nevertheless, they chose to act affirmatively to place her in harm's way.

The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society. In short, these facts support a substantive due process claim under law that was clearly established in 1994, and we are therefore obliged to reverse the dismissal of her complaint against the individual officers.[12]

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[12] The defendants have argued that Black is precluded from relitigating the findings of the Boone County Circuit Court in her state-law civil suit. In awarding judgment to the defendant officers on Black's wrongful death claim, the state court held that none of the state actors were the direct cause of the accident on the highway. *Chipman v. City of Florence,* No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996). While those findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim.

IV. Stemler's Claims against the Individual Officers

We turn now to the merits of Stemler's claims against the individual officers. She has raised claims of false arrest and malicious prosecution against the officers. She also asserts that her arrest violated the Equal Protection Clause insofar as it was based either on her sex or on her supposed sexual orientation. We again review the law to determine whether the officers should have known in February 1994 that their actions were in violation of applicable federal constitutional or statutory guarantees.

A. False Arrest and Malicious Prosecution

As noted above, Stemler brought a suit against the defendants herein in the Boone County Circuit Court alleging various state-law theories. The state court awarded summary judgment to the defendants on April 2, 1996. The state court described the facts in relevant part as follows:

> Upon speaking to Stemler, Officer Wince noted the odor of alcohol, conducted field sobriety tests, administered a PBT test (which read .105), and obtained an admission from Stemler that she had consumed alcoholic beverages. Based upon the above, Officer Wince decided to arrest Stemler for DUI.

Stemler v. City of Florence, No. 94-CI-00459, slip op. at 2 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996) (consolidated with *Chipman*). The court reasoned that the evidence established that there was probable cause to arrest her:

> There are no genuinely disputed material facts relating to the question of probable cause for the

> arrest of the Plaintiff, Stemler. Stemler stated at the scene that she had consumed alcohol, she had the smell of alcohol on her person, her performance on the field sobriety tests and her preliminary breath test result of .105 certainly constitutes [sic] probable cause.

Id. at 5. The state court then held that the existence of probable cause precluded both the false arrest claim and the malicious prosecution claim under Kentucky law.

Stemler is precluded from relitigating in this case the issue of whether there was probable cause to arrest her to the same extent that Kentucky would accord preclusive effect to the judgment against her in her state court civil suit. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984); *Allen v. McCurry*, 449 U.S. 90, 97, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980).[13] Under Kentucky law, "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Revenue Cabinet v. Samani*, 757 S.W.2d 199, 202 (Ky. Ct. App. 1988) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)). The issue of probable

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[13] Stemler argues, without elaboration, that she did not receive a fair hearing in the state court in her state-law civil suit. However, a state court proceeding is accorded preclusive effect in a later § 1983 suit so long as it meets minimal standards of due process. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982); *Osborn v. Ashland Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1134 (6th Cir. 1992). Stemler does not identify any reason to believe that she suffered a deprivation of due process in the state court.

cause for Stemler's arrest was actually litigated and decided in the state court suit, and was necessary to the disposition of the case. Although Stemler's appeal is pending in that case, the pendency of an appeal does not destroy the finality of the judgment for the purposes of issue preclusion under Kentucky law. *See Roberts v. Wilcox,* 805 S.W.2d 152, 153 (Ky. Ct. App. 1991). Thus, this court is bound by the state court's determination that there was probable cause for Stemler's arrest.

The existence of probable cause for Stemler's arrest forecloses her false arrest claim. A plaintiff bringing a constitutional claim of false arrest under the Fourth Amendment must show that there was not probable cause for the arrest. *See Donovan v. Thames,* 105 F.3d 291, 298 (6th Cir. 1997) (applying Kentucky doctrine of collateral estoppel).[14] Likewise, the existence of probable cause would negate the possibility of liability under a state-law malicious prosecution theory, and therefore under a federal constitutional theory as well, at least to the extent that Stemler alleges that the defendants sought to prosecute her despite knowing that there was not probable cause to do so. *See Baker v. McCollan,* 443 U.S. 137, 145, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979); *Coogan v. City of Wixom,* 820 F.2d 170, 175 (6th Cir. 1987).

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[14] Because we affirm the dismissal of the false arrest claim on the ground of collateral estoppel, we do not address the reasoning of the district court, based on *Albright v. Oliver,* 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994), that the right to be free from false arrest is not clearly established. On remand, if in the interim Stemler should secure a reversal on appeal of the judgment against her in her state-law suit, thereby destroying the collateral estoppel effect of that judgment, the district court should consider in the first instance whether Stemler's claim may proceed under the standard of qualified immunity that we have set out in this opinion.

Stemler, however, is not now asserting that sort of a malicious prosecution claim. Instead, she asserts that even if there were probable cause to prosecute her, Wince committed a constitutional tort by falsifying evidence against her. Under law that was clearly established in 1994, Wince would have violated Stemler's right to due process if he knowingly fabricated evidence against her, and if there is a reasonable likelihood that the false evidence could have affected the judgment of the jury. *See United States v. Lochmondy,* 890 F.2d 817, 822 (6th Cir. 1989); *see also Riley v. City of Montgomery,* 104 F.3d 1247, 1253 (11th Cir. 1997); *United States v. Epley,* 52 F.3d 571, 576 (6th Cir. 1995); *Grillo v. Coughlin,* 31 F.3d 53, 56 (2d Cir. 1994). A claim of fabrication of evidence does not require a conclusion that the state did not have probable cause to prosecute the claimant. The state court only found that there was probable cause to prosecute Stemler, and made no findings with regard to any claim of fabrication of evidence. Thus, since the state court in the civil suit made no findings on this issue, and the court in the state criminal case did not make any findings on this issue that were necessary to the final judgment (*i.e.,* Stemler's acquittal), she would not be estopped from pursuing this claim.

B. Failure to Plead an Evidence-Tampering Theory

However, Stemler did not allege this alternative theory in her complaint. The closest she comes to making such an allegation is at paragraph 48 of her amended complaint: "The Defendants, Officers Wince, Dolan, Dusing and City of Florence, instituted and continued the original criminal judicial proceeding against the Plaintiff by insisting upon her prosecution and conviction despite

their personal knowledge Plaintiff should not be so prosecuted." This allegation cannot fairly be read to give notice that she seeks to assert an evidence-tampering claim. The record reflects that the evidence-tampering claim first arose on May 7, 1996, in Stemler's response to the city's motion for summary judgment, after the individual officers were dismissed from the suit.

It is well-settled that the parties may constructively amend the complaint by agreeing, even implicitly, to litigate fully an issue not raised in the original pleadings. *See* 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1493 at 19 (2d ed. 1990). However, such a constructive amendment can have no effect upon a party who has been dismissed from the action, and who is not given notice that a new claim of liability has been asserted against him. Stemler, of course, was free to seek leave to amend her complaint again to raise her new theory of falsification of evidence, or to file a new complaint against Wince explicitly raising that claim. She did not do so. The district court did not err in dismissing Stemler's complaint by failing to consider a cause of action that she had not yet alleged. Consequently, this court is powerless to engage in any further review of her allegation that Wince falsified evidence against her in her criminal trial.

C. Equal Protection

The defendants also assert that Stemler is collaterally estopped from pursuing her equal protection claims. However, the determination of probable cause does not preclude a plaintiff from pursuing a claim that the state chose to prosecute her due to invidious discrimination. The

courts have long held that a selective enforcement claim may be available even where there is probable cause for prosecution. *See Wayte v. United States,* 470 U.S. 598, 607, 84 L. Ed. 2d 547, 105 S. Ct. 1524 (1985); *Oyler v. Boles,* 368 U.S. 448, 455-56, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962). While we have held that the possibility of a discriminatory motive does not affect the inquiry into the objective reasonableness of an arrest for the purposes of the Fourth Amendment, *see United States v. Ferguson,* 8 F.3d 385, 391 (6th Cir. 1993) (en banc), that case did nothing to question the long-established availability of a separate selective enforcement claim under the Equal Protection Clause. The Supreme Court subsequently confirmed our interpretation of the Fourth Amendment, and at the same time even more explicitly re-confirmed the availability of an equal protection claim despite the existence of probable cause:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

Whren v. United States, 517 U.S. 806, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996). Stemler is not collaterally estopped, and we therefore proceed to the merits of Stemler's equal protection claims.

In order to state a claim of selective prosecution, a plaintiff must demonstrate three elements:

> First, [the state actor] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even

> though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to.

United States v. Anderson, 923 F.2d 450, 453 (6th Cir. 1991) (citing *Wayte,* 470 U.S. at 608 n.10 & 609). With regard to the first element, it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside her category were not prosecuted. *See United States v. Armstrong,* 517 U.S. 456, 134 L. Ed. 2d 687, 116 S. Ct. 1480, 1487 (1996). Furthermore, there is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; "the standard is a demanding one." 116 S. Ct. at 1486.

We believe that this is the rare case in which a plaintiff has successfully stated a claim of selective prosecution. Stemler's complaint adequately alleges, and the record evidence supports a finding, that the defendant officers chose to arrest and prosecute her for driving under the influence because they perceived her to be a lesbian, and out of a desire to effectuate an animus against homosexuals. Each of the defendants was aware of Kritis's assertion that Stemler was a lesbian, and Dusing admitted that he relied on Kritis's version of the facts in deciding to arrest Stemler. Furthermore, the record supports a finding that Kritis was similarly situated to Stemler (or, indeed, far drunker than she), that the defendant officers perceived Kritis to be heterosexual, and that consequently they

chose not to arrest him at the same time that they arrested Stemler.

The defendants concede that Stemler's complaint alleges, and the record evidence could support a finding, that they decided to arrest and prosecute her because they perceived her to be a lesbian. They do not attempt to assert any justification whatsoever for this decision; instead they argue that as a blanket matter it is always constitutional to discriminate on the basis of sexual orientation, citing *Bowers v. Hardwick,* 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). However, *Bowers* held only that there is no substantive due process right to engage in homosexual sodomy, and expressly declined to consider an equal protection claim. 478 U.S. at 196 n.8. It is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation: "'If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'" *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620, 1627 (1996) (quoting *United States Dep't of Agric. v. Moreno,* 413 U.S. 528, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973)) (internal quotation and ellipses omitted). Stated differently, since governmental action "must bear a rational relationship to a legitimate governmental purpose," *Romer,* 116 S. Ct. at 1629, and the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause.

While this case, and *Romer,* involved animus related to sexual orientation, the principle involved in our case

really has nothing to do with that controversial area. *Moreno,* the case quoted in *Romer,* above, involved commune residents; the principle would be the same if Stemler had been arrested discriminatorily based on her hair color, her college bumper sticker (perhaps supporting an out-of-state rival) or her affiliation with a disfavored sorority or company.

It may be objected that *Romer* was not decided until after the defendants arrested and sought to prosecute Stemler allegedly for the sole reason of animus against her perceived sexual orientation. But it didn't take *Romer* to tell us that such arbitrary state action is contrary to the principle of equal protection of the laws.[15] It is a venerable rule under the Equal Protection Clause that the state may not choose to enforce even facially neutral laws differently against different portions of the citizenry solely out of an arbitrary desire to discriminate against one group. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 373, 30 L. Ed. 220, 6 S. Ct. 1064 (1886).

Furthermore, while a plaintiff in a selective-prosecution case must demonstrate that she was prosecuted because she was the member of some group, and not merely because the state actor prosecuted her out of purely personal animosity, *see Futernick v. Sumpter Twp.,* 78 F.3d 1051, 1057 (6th Cir.), *cert. denied,* 117 S. Ct. 296 (1996), the availability of such a claim has never been limited only to those groups accorded heightened scrutiny

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[15] We need not discuss whether any other aspect of *Romer*'s holding is sufficiently new that a state actor could not be expected to anticipate it. The core principle relevant in this case, that the state may not act solely out of the desire to harm an unpopular group, was clearly established by the case law in 1994.

under equal protection jurisprudence. *See id.* at 1056. Instead, a plaintiff makes out a selective-enforcement claim if she shows that the state based its enforcement decision on an "arbitrary classification," *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962), that is to say, a classification that gives rise to an inference that the state "intended to accomplish some forbidden aim" against that group through selective application of the laws. *Futernick*, 78 F.3d at 1056. A selective-enforcement claim such as this one is thus conceptually different from a claim that a statute violates equal protection; while almost every statute can be shown to have some conceivable rational basis, thereby surviving an equal protection challenge unless it is shown to discriminate against a group accorded heightened scrutiny, it will often be difficult to find a rational basis for a truly discriminatory application of a neutral law.

It is beyond cavil that Stemler has adequately alleged a selective-enforcement claim here. The record supports a finding that she was perceived to be a member of "an identifiable group," and that defendants sought to implement their animus against that group by arresting and seeking to prosecute her. The defendant officers are unable, and indeed have not even attempted, to demonstrate that there is any conceivable rational basis for a decision to enforce the drunk-driving laws against homosexuals but not against heterosexuals. The defendants can rely only on their assertion that discrimination on the basis of sexual orientation should be accorded no scrutiny whatsoever. We emphatically reject this assertion; the proposition that the state may constitutionally discriminate by enforcing laws only against homosexuals (or Centre College graduates or SAE members) is not now,

and never has been, the law. Under the facts as we are obligated to construe them, the defendants violated the core principle of the Equal Protection Clause by choosing to exercise the power of the state against Stemler solely for the reason that they disapproved of her perceived sexual orientation. Thus, the dismissal of her complaint must be reversed.

V. Conclusion

With respect to both plaintiffs, the district court's award of summary judgment to the municipal defendants and to the defendants in their official capacities is AFFIRMED. In No. 96-5996, the dismissal of Black's complaint against the individual officers is REVERSED. In No. 96-5993, the dismissal of Stemler's complaint against the individual officers is REVERSED with respect to her claim of denial of equal protection on the basis of sexual orientation; in all other respects, the judgment of the district court is AFFIRMED. Both cases are REMANDED to the district court for further proceedings consistent with this opinion.

CONCUR BY: HARRY W. WELLFORD

CONCUR: HARRY W. WELLFORD, Circuit Judge, concurring. I concur in part II dealing with a conclusion of no municipal liability and propriety of summary judgment for the City and the County in this case. As to part I, I do not necessarily subscribe to all of the findings made, particularly as to subparts B and D. I do not think it necessary to go into the detail recited by Judge Boggs to rule on the orders granting qualified immunity to the individual defendants.

I also concur in parts IV.A and IV.B that "probable cause for Stemler's arrest forecloses her false arrest claim" and that "probable cause would negate the possibility of liability under a state-law malicious prosecution theory," or a false arrest claim. Also, I concur in the conclusion that Stemler may not pursue further a claim that defendant Wince falsified evidence against her in her state criminal trial.

As to part III, the claim on behalf of the deceased Conni Black, I believe that the alleged conduct of the individual police officers supports reversal of their motions to dismiss. I do have reservations about concluding that deliberate indifference may have been averred as a matter of constitutional law, but I would agree with Judge Boggs to the extent he maintains that "the defendants should have known in February of 1994 that their [alleged] actions violated [Black's constitutional] right."

I would not cite *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir. 1987) (en banc), as persuasive authority in this case. The individual defendants in that case had no direct relationship of any kind with the victim. Furthermore, I am doubtful about the continuing authority of *Nishiyama,* and I consider it settled in the Sixth Circuit that gross negligence alone may not subject a police officer to § 1983 liability absent a showing of willful disposition to harm or to deliberately ignore the plight of the victim in custody. *Lewellen v. Metropolitan Gov't of Nashville & Davidson County,* 34 F.3d 345, 351 (6th Cir. 1994).

Lewellen also holds that liability of a state actor may arise from some "action that is 'arbitrary in the constitutional sense.'" This is a *higher standard* than gross negligence. *Lewellen* requires some designed and intentional

activity on the part of the state actor to harm or punish someone. *Id.* And in this case, there was a sufficient allegation of arbitrary conduct on the part of some defendants intentionally designed to injure or punish Conni Black. I would hold simply that Black's estate has alleged sufficient facts to survive a motion to dismiss and that we should therefore reverse the contrary holding of the district court and remand for further consideration of the existence and proof of a constitutional tort. To put it another way, the alleged conduct of certain individual defendants may have been sufficiently shocking to the conscience that the Black claim should not have been dismissed against those defendants. *See Collins v. City of Harker Heights,* 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). I am, however, particularly reluctant to expand upon the "highly elastic notion of substantive due process." *Lewellen,* 34 F.3d at 351.

I wholeheartedly agree with Judge Boggs' conclusion that "under any definition of the term, Black was in the defendant officer's custody at the time she was forced into Kritis' truck." The district court erred, in my view, in holding that Black, "who was very intoxicated . . . was not taken into custody in the ordinary sense." I believe there is adequate averment and showing that Black was effectually taken into custody. The district court therefore erred, I believe, in granting motions to dismiss as to the individual defendants.

I next address part IV.C, Stemler's remaining claims against the individual officers based upon an alleged equal protection violation, which Judge Boggs characterizes as alleged selective prosecution. I cannot equate an alleged animus against Stemler because of a perception about her sexual proclivities with discrimination based upon race,

sex, national origin, or the like.[1] There may be enough basis in Stemler's claim that some individual defendants based their law enforcement actions on some arbitrary and capricious classification or selectively enforced the laws on drunken driving, public intoxication, or public endangerment to warrant our reversing the dismissal of this claim. However, I do not reach the categorical decision of Judge Boggs that disapproval of Stemler's perceived sexual orientation was the sole, or even a significant, basis for her arrest by the defendants, and that this action therefore violated the equal protection clause.

The district court, upon remand, must also determine the effect, if any, on the federal claims asserted in this case of any future decision of the Kentucky Court of Appeals concerning the individual claims of Stemler and on behalf of Black. There is also the question whether plaintiffs impermissibly split their causes of action in these cases. They could have filed the § 1983 actions in state court. *See Kabealo v. Davis,* 829 F. Supp. 923, 928 (S.D. Ohio 1993) (splitting state claims from federal claims "would result in a needless duplication of expense and judicial resources"); *Administaff, Inc. v. Kaster,* 799 F. Supp. 685, 690 (W.D. Tex. 1992) ("Federal and state claims 'inexorably tied together' are best left together").

I would affirm the decision of the district court as to the municipal defendants, and as to defendants in their official capacities. I would affirm dismissal of Stemler's

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[1] I believe *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), simply holds that a statute purporting to deprive homosexuals of any special protections under state law has no rational relation to legitimate state government purposes. Furthermore, *Romer* was decided long after these defendants acted in this case.

claims of false arrest, malicious prosecution, and evidence falsification. I would **REVERSE** and **REMAND** for further proceedings and consideration of alleged federal constitutional torts in light of the decision set out herein, and in light of the Kentucky appellate decision on the remaining claims.[2]

[2] I also note the death of the Boone County Sheriff.

(3)

FILED
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No. 03-1574

In The
Supreme Court of the United States

BOBBY JOE WINCE, in his individual capacity; JOHN DOLAN, in his individual capacity; and THOMAS DUSING, in his individual capacity,

Petitioners,

v.

SUSAN STEMLER, WILLIAM CHIPMAN, Administrator of the Estate of CONNI BLACK, and RANDY BLACK, Legal Guardian of Shianne Black,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

I. RESPONDENTS GIVE SHORT SHRIFT TO THE CONFUSION SPAWNED BY INCONSISTENT APPLICATIONS OF THE *ROOKER-FELDMAN* DOCTRINE AS A REASON FOR GRANTING THIS PETITION 1

II. ALL OF RESPONDENTS' ARGUMENTS ARE FOUNDED UPON THE IMPOSSIBLE PREMISE THAT CHIPMAN'S FEDERAL AND STATE CLAIMS ARISE FROM TWO SEPARATE FACTUAL SCENARIOS..... 3

III. GIVEN THE LEGAL QUESTIONS INVOLVED IN THE FEDERAL AND STATE LAW CLAIMS, RESPONDENTS' ARGUMENT THAT THE *ROOKER-FELDMAN* DOCTRINE DOES NOT APPLY IS SPECIOUS 4

IV. BECAUSE THE PREMISE OF RESPONDENTS' ARGUMENT FAILS WITH RESPECT TO THE INAPPLICABILITY OF THE TRANSACTIONAL APPROACH, CLAIM PRECLUSION CLEARLY APPLIES 6

V. THE SIXTH CIRCUIT OPINION IGNORES ALL MANNER OF PRECLUSION AND ABSTENTION DOCTRINES AND INVITES DUPLICITY OF LITIGATION WHICH IS WASTEFUL OF JUDICIAL RESOURCES..... 8

TABLE OF AUTHORITIES

Page

CASES

Ashby v. City of Louisville, 841 S.W.2d 184 (Ky. App. 1992) 3, 4, 7

CIGNA Healthcare of St. Louis, Inc. v. Kaiser, 294 F.3d 849 (CA7 2002) 8

City of Florence v. Chipman, 38 S.W.3d 387 (Ky. 2001) 5

Colorado River Water Conservation Dist. No. 7 v. U.S., 424 U.S. 800 (1976) 8, 9

DeShaney v. Winnebago Co. Dept. of Social Services, 489 U.S. 189 (1989) 3, 4, 10

DeVona v. City of Providence, 652 F.Supp. 683 (D.R.I. 1987) 9

District of Columbia Ct. of App. v. Feldman, 460 U.S. 462 (1983) 1

Ericksen v. Village of Willow Springs, 876 F.Supp. 951 (N.D.Ill. 1995) 9

Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995) 4

Gen. Reinsur. Corp. v. Ciba-Geigy Corp., 853 F.2d 78 (CA2 1988) 8

Gonzalez v. Torres, 915 F.Supp. 511 (D.P.R. 1996) 9

Lumen Constr., Inc. v. Brant Constr. Co., Inc., 780 F.2d 691 (CA7 1989) 8

Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1 (1983) 9

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 6

Rojas-Hernandez v. Puerto Rico Elec. Power Auth., 925 F.2d 492 (CA1 1991) 8

TABLE OF AUTHORITIES – Continued

Page

Rooker v. Fidelty Trust Co., 263 U.S. 413 (1923) 1

Slaughter v. AT&T Info. Sys. Inc., 905 F.2d 92 (CA5 1980) 8

Watts v. K,S&H, 957 S.W.2d 233 (Ky. 1997) 7

Wicker v. Bd. of Educ'n of Knott Co., 826 F.2d 442 (CA6 1987) 8

Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459 (Ky. 1998) 7

CONSTITUTIONS

Fourth Amendment 9

Fourteenth Amendment ..... *passim*

STATUTES

42 U.S.C. §1983 ..... 2, 4, 9

I. RESPONDENTS GIVE SHORT SHRIFT TO THE CONFUSION SPAWNED BY INCONSISTENT APPLICATIONS OF THE *ROOKER-FELDMAN* DOCTRINE AS A REASON FOR GRANTING THIS PETITION

In support of their Petition for Writ of Certiorari, Petitioners cited the confusion spawned by the federal courts' inconsistent applications of the *Rooker-Feldman* doctrine as a compelling reason for granting this Petition.[1] In that vein, Petitioners cited and analyzed numerous cases from the lower federal appellate and district courts, including some from each of the Second, Third, Seventh, Eighth, Ninth and Tenth Circuits, and multiple law review articles. Each of these authorities specifically acknowledge the confusion and inconsistency that has resulted from attempts by various forums to apply the *Rooker-Feldman* doctrine. Respondents dismiss all of these authorities, insisting that "the lower courts consistently apply the same standard" and that inconsistent results are due to the varying fact patterns to which the doctrine is applied. (Respondents' Brief, pp. 13-14) Respondents' shallow argument must fail in light of the difficulty which lower courts have repeatedly acknowledged having – and which scholars and lawyers have repeatedly observed – in defining the relationship between *Rooker-Feldman* and other preclusionary and abstention doctrines, identifying the purpose and role of *Rooker-Feldman*, and applying the doctrine's nebulous "inextricably intertwined" test.

Notwithstanding Respondents' contentions otherwise, this case is the ideal vehicle with which to clarify those confusing issues. This case provides an opportunity for this Court to clarify the relationship between *Rooker-Feldman* and *res judicata*, since both doctrines are squarely presented by this case. In addition, this case provides an opportunity for this Court to provide much-needed guidance on the meaning of "inextricably intertwined",

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[1] The *Rooker-Feldman* doctrine is derived from two United States Supreme Court opinions, *Rooker v. Fidelty Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983).

given the overlap between Chipman's Fourteenth Amendment claim and his state law claim.

In addition, the context of this case makes it an appropriate vehicle with which to resolve these troubling issues presented by *Rooker-Feldman* and *res judicata*. Police officers and citizens are involved in encounters every day and many of those encounters result in federal §1983 actions, meritorious or not, against police officers. Of course, fact patterns which lead to §1983 actions generally also lead to state law claims. As such, the extent to which federal claims and state law claims which arise from the same police-citizen encounter are "inextricably intertwined" will be presented time and again until the issue is squarely addressed by this Court.

Finally, as a practical matter, the risk of diametrically-opposed outcomes should this Court decline to grant this Petition, is substantial and highly prejudicial to Petitioners. On one hand, the Kentucky Supreme Court has determined that Petitioners cannot be found negligent in connection with the injuries Black sustained. On the other hand, if the Sixth Circuit's opinion stands, Petitioners may potentially be found liable under §1983, a cause of action which requires a showing of intentional misconduct. The possibility that the same decision on the part of Petitioners can at once be held insufficient to support a finding of negligence, but sufficient to support a finding of intentional misconduct is akin to finding that the same evidence is insufficient to support a finding of civil liability, but is sufficient to support a finding of guilt beyond a reasonable doubt.

The effect of the Sixth Circuit's decision in this case is to fail to give "full faith and credit" to the prior decision of the Kentucky Supreme Court. The basic concepts of federalism are impacted by that failure.

For those reasons, Petitioners respectfully petition this Court to grant a writ of certiorari in this case in order to entertain the problematic issues involving the *Rooker-Feldman* doctrine.

II. ALL OF RESPONDENTS' ARGUMENTS ARE FOUNDED UPON THE IMPOSSIBLE PREMISE THAT CHIPMAN'S FEDERAL AND STATE CLAIMS ARISE FROM TWO SEPARATE FACTUAL SCENARIOS

All of Respondents' arguments in opposition to this Petition for Writ of Certiorari depend on the premise that Chipman's federal and state law claims arise from two separate factual scenarios. Specifically, Respondents assert in each of their arguments that Chipman's federal claims arise from the "police stop" scenario, whereas his state claims arise from the "traffic accident" scenario. (Brief in Opposition, pp. i, 11, 14-15, 19, 20-21, 27, 29) This premise is faulty.

In federal court, Chipman alleged liability against Petitioners under the Fourteenth Amendment for failing to protect Conni Black from the injuries she sustained in the fatal traffic accident she was involved in after she left the scene of a traffic stop with an intoxicated driver. The factual underpinning of their allegation is Petitioners' failure to prevent Black from leaving the scene of the traffic stop with an intoxicated driver. Of course, the dispositive issue in resolving Chipman's Fourteenth Amendment claim is whether or not Black was in police custody at the time of the traffic stop; otherwise, Petitioners had no duty to act for her protection. *DeShaney v. Winnebago Co. Dept. of Social Services*, 489 U.S. 189 (1989).

Similarly, in state court, Chipman alleged liability against Petitioners for negligence under Kentucky law, based on the theory that Petitioners, as police officers, failed to adequately discharge their duty to protect Black from the harm which befell her in the fatal traffic accident she was involved in after she left the scene of the traffic stop with an intoxicated driver. The factual underpinning of their allegation is Petitioners' failure to prevent Black from leaving the scene of the traffic stop with the intoxicated driver. Under Kentucky law, a police officer has no affirmative duty to protect a citizen from injuries perpetrated by a third person in the absence of a "special relationship" between the police officer and the citizen. A "special relationship" exists if the citizen is "in state custody or otherwise restrained by the state at the time in question." *Ashby v. City of Louisville*, 841

S.W.2d 184 (Ky. App. 1992); *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995). Thus, the dispositive issue in resolving Chipman's state law claim was whether or not Black was in police custody at the time of the traffic stop; otherwise, Petitioners had no duty to act for her protection.

Accordingly, Chipman's state law claim hinged on the police stop. Indeed, but for the traffic stop, there could be no argument that a "custodial relationship" existed and consequently, no argument that a duty to protect arose under state law. As such, it is simply impossible to separate the "police stop" from the "traffic accident" and to view Chipman's claims as having arisen from two separate factual scenarios.

III. GIVEN THE LEGAL QUESTIONS INVOLVED IN THE FEDERAL AND STATE LAW CLAIMS, RESPONDENTS' ARGUMENT THAT THE *ROOKER-FELDMAN* DOCTRINE DOES NOT APPLY IS SPECIOUS

As demonstrated herein, the issue that is dispositive of Chipman's federal claim and state law claim are one and the same. Specifically, Chipman's §1983 claim – forged under a Fourteenth Amendment "duty to protect" theory – requires resolution of the issue whether Black was in custody at the traffic stop. *DeShaney*, *supra*. Likewise, Chipman's claim under Kentucky law – forged under a theory that there was a "special relationship" between Black and Petitioners, resulting in a duty to protect her – required resolution of the issue whether Black was in custody at the traffic stop.[2] Thus, Chipman's federal and state law claims are inextricably intertwined for purposes of the *Rooker-Feldman* doctrine.

In resolving Chipman's state law negligence claim, the Kentucky Supreme Court ruled as a matter of law that Black was not in custody during the traffic stop or at any other time:

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[2] Under Kentucky law, a "special relationship" arises when a citizen is in state custody or otherwise restrained by the state. *Ashby*, *supra*; *Fryman*, *supra*.

> [Black] was not in custody or otherwise restrained as a result of the conduct of the officers . . . The mere fact that the police told Black to remain in the Stemler automobile while the police were taking control of the investigation scene does not rise to the level of custody or "being otherwise restrained." A brief detention at a traffic stop does not create the relationship of custody . . . [citation omitted] . . . Our review of the lengthy record in this case causes us to conclude that the Court of Appeals was in error when it determined that Black was in custody and that the officers had a duty to protect her from third-party harm. The facts as considered by the circuit judge in granting summary judgment are that Black remained in the Stemler automobile during the traffic investigation stop and that she asked to leave the scene with Kritis. She also walked on her own to the Kritis truck despite being intoxicated. She was not physically placed in the vehicle by any of the police officers and she was not given a threat by any of the officers either to leave with Kritis or face arrest. **The consequence is that Black was never in custody or otherwise restrained so as to give rise to a special relationship between the police officers and Black.** There is no evidence in the record from which it can be concluded that Black was in custody by the police or any state actor at the time the pickup truck struck the guardrail.

City of Florence v. Chipman, 38 S.W.3d 387, 391-392 (Ky. 2001) (emphasis added). The Sixth Circuit's suggestion that this conclusion was mere dictum, a suggestion which it does not explain or support, takes a small part of the state court's opinion out of context and ignores the legal and factual realities of the case. The state court proceedings were directed at establishing whether or not Black was in custody *at the time of the traffic stop*. Indeed, since all parties acknowledged Petitioners were not present at the time of the traffic accident, the only relevant time considered by the state courts in resolving the custody question was the time of

the traffic stop, and the only factual basis for liability considered by the state court was Petitioners' failure to prevent Black from leaving the scene of the traffic stop with the intoxicated driver. Under these circumstances, the Kentucky Supreme Court's conclusion that Black was not in custody at the time of the traffic stop was essential to its decision, and cannot possibly be considered dictum.

Under the standard set forth in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), the Sixth Circuit should have abstained from considering Chipman's Fourteenth Amendment claim because that claim is inextricably intertwined with the state law claim that the Kentucky Supreme Court fully and finally adjudicated. Specifically, as demonstrated herein, in considering Chipman's state law negligence claim, the Kentucky Supreme Court decided that Black *was not* in custody at the time of the traffic stop. Therefore, Respondents' Fourteenth Amendment claim can succeed only to the extent that the Kentucky Supreme Court's decision was wrong, i.e., only if Black *was* in custody at the time of the traffic stop. Thus, from any vantage point, these two claims are inextricably intertwined and the Sixth Circuit should have deferred to the state court's decision.

IV. BECAUSE THE PREMISE OF RESPONDENTS' ARGUMENT FAILS WITH RESPECT TO THE INAPPLICABILITY OF THE TRANSACTIONAL APPROACH, CLAIM PRECLUSION CLEARLY APPLIES

Respondents argue that the transactional approach to claims preclusion does not apply because they have not split their causes of action. Their argument in this regard depends on the premise that their federal and state law claims arise from two separate factual scenarios, a premise shown herein to be without merit. Particularly telling in this regard is Respondent's assertion that the claims are different because the "thrust" of Chipman's federal action was to prove the existence of a "custodial relationship", while the "thrust" of his state action was to prove the existence of a "special relationship". (Respondents' Brief, p. 21) This is a distinction without a difference. Under Kentucky law, a "special relationship" exists

when a state actor places a citizen in custody or otherwise restrains him. *Ashby, supra*. Thus, the "thrust" of Chipman's federal and state law claims are identical, i.e., each depends on the existence of a custodial relationship. In pursuing one claim in federal court and the other in state court, Respondents sought two separate rulings on the same legal issue. Contrary to Respondents' contention, this is an egregious example of splitting one's causes of action.

There can be no question that both of Chipman's lawsuits arise from the same transactional nucleus of facts. Each can only be viewed as arising out of both the police stop and the subsequent accident. Indeed, Chipman's federal claim cannot succeed without the accident because, without the accident, there would be no "deprivation of life, liberty or property", a prerequisite for a claim under the Fourteenth Amendment. Conversely, Chipman's state claim cannot succeed without the police stop because, but for the police stop, there could be no argument that Petitioners owed Black a duty to act for her protection. Indeed, in recognition of the fact that these lawsuits arose from the same transactional nucleus of facts, the parties engaged in a single course of discovery, all of which was directed toward the issue whether Black was in custody during the police stop.

Since the lawsuits arise from the same transactional nucleus of facts, the Kentucky Supreme Court's judgment is deemed under Kentucky law to have adjudicated every matter which was or could have been brought under the same set of facts. *E.g., Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998); *Watts v. K,S&H*, 957 S.W.2d 233 (Ky. 1997). Since Chipman's Fourteenth Amendment claim could have been brought under the same set of facts, had the Sixth Circuit properly applied Kentucky law respecting claims preclusion, it would have afforded the Kentucky Supreme Court's judgment preclusive effect with respect to Chipman's Fourteenth Amendment claim.

V. THE SIXTH CIRCUIT OPINION IGNORES ALL MANNER OF PRECLUSION AND ABSTENTION DOCTRINES AND INVITES DUPLICITY OF LITIGATION WHICH IS WASTEFUL OF JUDICIAL RESOURCES

Respondents' arguments illustrate why this case cries out for this Court to intervene and severely limit or eliminate the practice by which Plaintiffs are allowed to pursue simultaneous, parallel claims in state and federal Court involving the exact same factual circumstances.

Respondents suggest that the law allows them to maintain parallel actions in federal and state courts to conclusion because "there is no blanket prohibition against simultaneous suits in federal and state courts". (Respondents' Brief, p. 18) That assertion defies all manner of preclusion and abstention doctrines, some of which are set forth in the very cases upon which Respondents rely for their preposterous assertion.

Of course, a litigant who pursues parallel actions generally is not able to litigate both to conclusion because a judgment or verdict in one forum will typically have preclusive effect, under the doctrine of *res judicata*, on the litigant's attempt to litigate the same issues in the second forum. *Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691 (CA7 1989); *Rojas-Hernandez v. Puerto Rico Elec. Power Auth.*, 925 F.2d 492 (CA1 1991); *Slaughter v. AT&T Info. Sys. Inc.*, 905 F.2d 92 (CA5 1980); *Gen. Reinsur. Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78 (CA2 1988); *CIGNA Healthcare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849 (CA7 2002). This reality is specifically recognized in the passage from *Wicker v. Bd. of Educ'n of Knott Co.*, 826 F.2d 442 (CA6 1987), cited on pages 17-18 of Respondents' Brief.

In addition, Respondents cite *Colorado River Water Conservation Dist. No. 7 v. U.S.*, 424 U.S. 800 (1976) for the proposition that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in federal court." (Respondents' Brief, p. 17) While such a statement is found in *Colorado River*, that statement grossly misrepresents the significance of that case. In point of fact, the *Colorado River* Court recognized that it is not always

appropriate for a federal court to allow the same litigant to pursue parallel actions in federal and state courts where "considerations of wise judicial administration . . . conservation of judicial resources, and comprehensive disposition of litigation" are involved. *Id.* at 817. In that case, this Court dismissed a federal action filed by the United States against a water conservation district in deference to a parallel state court proceeding, citing as the primary reason for its decision the avoidance of piecemeal adjudication of water rights. *Id.* at 819. When a district court decides to dismiss or stay under *Colorado River*, it effectively concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983). Thus, the decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses. *Id.*

In the context of §1983 litigation, lower federal courts have been especially inclined to abstain in deference to a parallel state court proceeding. *E.g., Ericksen v. Village of Willow Springs*, 876 F.Supp. 951 (N.D.Ill. 1995) ("the existence of concurrent jurisdiction over actions brought pursuant to §1983 weighs strongly in favor of abstention"); *Gonzalez v. Torres*, 915 F.Supp. 511 (D.P.R. 1996) (abstaining where Fourteenth Amendment claim can be entertained by state court and that forum is adequate to protect plaintiff's rights); *DeVona v. City of Providence*, 652 F.Supp. 683 (D.R.I. 1987) (dismissing §1983 action brought under Fourth and Fourteenth Amendments because overall result of parallel actions would be piecemeal adjudication and would result in waste of judicial resources).

In one such case, a federal district court decried the practice of maintaining parallel actions:

> . . . a claimant who files simultaneous complaints in both federal and state forums obviously does so in order to postpone as long as possible his decision as to where he can obtain the most advantageous forum in which to litigate his claim. That plaintiff wants to let a few chips fall before he places his bet . . . It is clearly necessary to discourage these simultaneous and

> repetitive filings, because they needlessly augment the number of proceedings entertained by the court. This increased administrative burden, in turn, can severely delay adjudication of cases where claimants are truly in need of obtaining relief from the federal courts . . . Any rule which sanctions simultaneous or repetitive suits places the administration of this court's caseload at the mercy of the procedural posturing of plaintiffs' attorneys. Without the knowledge or the ability to control when a case before it might suddenly disappear in favor of a parallel state court proceeding, the Court could be adversely affected in the effective administration of its day to day business . . .

DeVona, *supra*.

Thus, there is no merit to Respondents' contention that they should be permitted to litigate parallel actions to conclusion. That Respondents could conclude to the contrary cries out for intervention by this Court to clarify the law in this regard.

Respectfully submitted,

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